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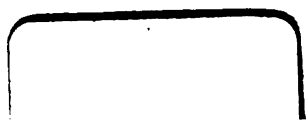
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A

T R E A T I S E

ON



THE STATUTE OF FRAUDS,

AS IT REGARDS

**DECLARATIONS IN TRUST, CONTRACTS, SURRENDERS,
CONVEYANCES, AND THE EXECUTION AND
PROOF OF WILLS AND CODICILS.**

TO WHICH IS PREFIXED A SYSTEMATIC DISSERTATION UPON THE
ADMISSIBILITY OF PAROL AND EXTRINSIC EVIDENCE, TO EX-
PLAIN AND CONTROL WRITTEN INSTRUMENTS.

BY WILLIAM ROBERTS,

Of Lincoln's Inn, Author of a Treatise on Fraudulent Conveyances.

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TO THE
HON. SIR ALLAN CHAMBRE, KNIGHT,
ONE OF HIS MAJESTY'S JUSTICES
OF THE
COURT OF COMMON PLEAS, &c.

SIR,

I HAVE ventured to prefix your Name to these sheets, with the hope of attracting your attention to a Work, the fatigue attending the execution whereof will be amply compensated, if it shall be so fortunate as to obtain your approbation. Your permission to do this has not been asked, because I was unwilling to involve the credit of your judgment in the success of my enterprise. But the very nature of my undertaking, naturally reminded me of some professional obligations to you at the commencement of my studies, and I was glad of this opportunity of giving you an appropriate, though, perhaps, unworthy testimony of the sentiments which your kind assistance excited in me.

The sort of publication which I have ventured to bring forward, aspires to something above the rank of a mere compilation of cases ; and as it is composed with a view to reduce into system and harmony a great variety of interesting topics, at present involved in much apparent contradiction, and inconsistency of doctrine, it is of some importance to the profession, that the credit of such a book should soon be fixed ; and who is more able to establish its character, in the opinion of lawyers, than yourself ? If I shall have seemed to you

to have affected things above my ability, I shall best learn from your authority a lesson of prudent humility, and my misemployed industry will receive a salutary correction. May I then humbly request you, to take up my volume, with a view to give me the advantage of your opinion of its execution, and thus to anticipate inferior criticism? You will thereby satisfy me as to the degree of my present success, before I engage again in the intended prosecution of my ultimate plan of reviewing the remaining subjects of the Statute of Frauds, and also the provisions of the statute of fraudulent devises, for which my materials are already collected.

Precipitancy is no excuse for error : no apology is meant to be founded upon the necessity which the pressure of other engagements has laid upon me of composing and preparing for the press this entire volume, in the course of the summer and autumn of this year. But I may, perhaps, without irreverence, impute to the irresolute urbanity and over-refining temper of our courts, in the application of the provisions of this great Statute, doubting between the danger of departing from, and the rigour of adhering to the letter, much of that difficulty by which I have been overcome. With you, Sir, I know this will plead for me with its just effect, and by this assurance I feel myself strengthened for the trial that awaits me at the bar of the public.

With the sincerest respect, I am,

Sir,

Your much obliged

And very humble servant,

WILLIAM ROBERTS.

ADVERTISEMENT.

IT will be perceived in perusing the following pages, that it was the Author's original intention to prosecute the whole Work at once to its completion, in two volumes, making the first to consist of what is now offered to the public in this present Book, and the second, of the remaining subjects of the statute. The writer has, however, strong reasons for changing his plan as to the manner of publishing his Work, and has thought it best to produce the two parts as *separate treatises*, the first whereof, which is that now submitted to the Profession, contains the doctrines and decisions respecting those portions of the statute which hold an affinity together, and the second will comprehend the remaining Topics which are more miscellaneous.

Since the work has gone to press, some few cases have been determined in the Courts of Law and Equity, of which it will be proper that the Reader should be reminded, when his attention is drawn to the subjects to which they relate, by the passages connected with them in this Work. In that part of the subject of Parol and Extrinsic Evidence, which is under discussion in pages 27, 28, and 29, the Writer might have referred to the case of Doe on the demise of Leach *v.* Micklem, 6 East, 486, as an authority for some of his positions, if that case had then been printed. The case of Williams *v.* Jones, just reported in the 10th volume of Vezey, jun. may be

Sale notes.

added by the reader at the end of the cases enumerated in the note in page 68. The subject of Auctions, treated of in pages 112, 113, 114, et seq. leads to the consideration of the effect of Sale Notes, and Memorandums made by third persons, as Brokers or Agents. Unhappily, a clear line of doctrine upon this very important topic is not furnished by the cases. The Auctioneer, in respect to sales of goods, has been considered as the agent for both parties : but a memorandum or entry made by the clerk, or manager, of one of the parties, seems to have been regarded as standing on a different ground ; and his putting down on paper the names of the principals, is held not to be done with the same extent of authority. At least, this has been so held in a case where the Clerk or Broker of the *Seller* made the entry, and the buyer was the party charged. See *Symonds v. Ball*, 8 T. R. 151. Still, however, in *Rucker v. Cammeyer*, 1 Esp. N. P. 107, where the Broker of the Seller made the entry, the Buyer was held by Lord Kenyon to be bound ; and his Lordship applied to that case the principle of *Simon v. Motivos*, saying, that the Broker was to be considered as the Agent of both parties. In point of fact, the Broker had made two sale notes, one for the Seller, and one for the Buyer, and the Buyer had sent for and accepted his, but the Chief Justice decided the case independently of that circumstance. But in a case of *Champion and others v. Blummer*, just determined in C. B. vid. *Bos. et Pull.* 1st vol. N. R. it was held that such an entry by the Seller's Clerk, where the name of the purchaser was not entered, could not bind even the *Seller*, the *Buyer* not being bound. Which case it is impossible to reconcile with *Rucker v. Cammeyer*,

unless the communication between the Seller's Broker and the Buyer be supposed to have had weight with the Judge in that case, or the circumstance of the purchaser's name's not being put down by the Broker in the case determined in the Common Pleas, be regarded as one of the grounds of the decision.—

To this last case, the doctrine laid down in *Seton v. Slade*, 7 Vez. jun. 275, viz. that the signature of the party charged, will bind him without any signing by the other party, is opposed; for it is impossible to think there can be any such distinction between sales of goods and lands to this purpose, as is suggested by the Reporter's note to the case of *Champion v. Plummer*. Indeed, since the cases of *Wain v. Warlters*, and *Egerton v. Matthews*, if any distinction is to prevail, it should seem that there is greater reason for holding the actual signing by both parties to be necessary to satisfy the exigency of the 4th section; of which 'sales of land' form one of the objects.— See the remarks in page 117, note 58.

In a late case of *Stansfield v. Habergham*, 10 Vez. jun. 281, may be read some useful comments, by which the form of the conveyance mentioned in the note in page 340, as suggested by the late Mr. J. Wilson, in *Habergham v. Vincent*; for carrying into effect the testator's intention, with respect to the limitations in his will, is censured and corrected.

The first part of the REPORTS by Messrs. SCHOALES and LEFROY, of CASES determined in the COURT of CHANCERY in IRELAND, during the time of Lord REDSDALE, (a most valuable present to the Profession, and which I understand will be shortly published in London) has just been put into my hand, upon the perusal whereof it appears that many of the

An agreement concerning an interest in land must express the terms, or ascertain the same by clear reference; nor can parol evidence be admitted to prove the connexion of two instruments without such reference.

points treated of in this volume, either directly in the text, or incidentally in the notes, have received elucidation from the great knowledge and judgment of the present Lord Chancellor of Ireland. In the case of *Clinan v. Cooke*, 1 Chan. Ca. in Ireland, 22, where A, by public advertisement, offered land to be let for three lives or thirty-one years, and proposals having been made by B, and accepted, an agreement was executed between B and the agent of A, authorised to contract for him for making a lease of the lands, in which agreement the term for which the lease was to be made was not mentioned.—A was held not to be bound to perform this contract, there being no evidence *in writing of the term to be demised*. And as there was no reference in the agreement to the advertisement, parol evidence was held not admissible to connect the one with the other so as to ascertain the term; such evidence being opposed by the provision of the Irish Statute of Frauds, 7 W. 3, c. 12, the clauses whereof are copied from the English Statute 29 Car. 2, c. 3.

But if there be such reference, it may be admitted to show the identity of the paper referred to.

It was agreed by his Lordship, that if the agreement had referred to the advertisement, parol evidence might have been admitted to show the identity of the advertisement. He adverted to the case of *Tawney v. Crowther*, 3 Bro. 6. c. 318, wherein Lord Thurlow had considered a *reference* to the written agreement as essentially necessary, which made them, in his view, one and the same thing, the parol evidence being no otherwise necessary, than to identify the thing produced. So far as that case was applicable to the case before him, his Lordship regarded it as an authority for requiring a clear reference to the existing instrument containing the terms; but the general grounds of the decision of *Tawney v. Crowther*,

as also of *Allan v. Bower*, 3 Bro. C. c. 149, were questioned by his Lordship. See page 108, of this volume.

In the same case of *Clinan v. Cooke*, above referred to, (see the same Reports above-mentioned, page 138, et seq.) the reader will find some observations of Lord Redesdale, very illustrative of the doctrine of Courts of Equity treated of in pages 81, 82 and 83, of this volume, in respect to the difference between admitting parol evidence when offered by a plaintiff to support an application for compelling a specific performance, and when it comes on the part of a defendant, to show a variance between the agreement signed, and the one really intended to have been signed. The Statute, said his Lordship, does not say that a *written agreement SHALL bind*, but that an *unwritten agreement shall not bind*. The equity to resist is left as it was before the Statute; it does not say that if a written agreement be signed, the same exception shall not hold to it that did before the Statute.

Of the different considerations under which, in respect to relief, the plaintiff pressing for performance, & the defendant resisting it, come in a Court of Equity.

In page 153, et seq. of this Book, the Reader will find the question, whether payment of a part of the purchase money is part-performance, considered upon the authorities; he will there observe, that the writer has concluded it to be settled that a payment of a substantial part of the purchase money is a part-performance, and as such takes the case out of the Statute of Frauds; he will perceive, however, that at the conclusion of that head a regret is expressed, that such case has not been considered as open to compensation and retribution, instead of being added to the number of exceptions to the Statute. In the above-mentioned important case of *Clinan v. Cooke*,

Whether payment of purchase money is part-performance.

Lord Redesdale has laid down a principle as applicable to the doctrine of part-performance which has conducted him to the decided conclusion that payment of money is not part-performance. 'Nothing,' his Lordship said, 'is to be considered as a part-performance which does not put the party into such a situation that it is a fraud upon him unless the agreement be performed; as for instance, where possession is taken the party becomes a trespasser if there be no agreement; in which case, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence is admissible; and if it be admissible for such purpose, there is no reason why it should not be admissible throughout. But payment of money is not part-performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest.' The reader will observe that this doctrine precisely corresponds with that which, in page 150 of this Work, is laid down, as furnished by the cases of *Lacon v. Mertins*, and *Buckmaster v. Harrop*, that to entitle a party to this equitable relief against the Statute on the ground of part-performance, he must appear to be in a predicament to receive a prejudice by the non-performance. In *Buckmaster v. Harrop*, 7 Vez. jun. 347, Sir William Grant observes, that if the vendor had let the vendee's lessee into possession, *that* would have been an act by which he might have received a prejudice; and there are a variety of cases to show that possession by the vendee, followed by an expenditure in improvements, places him in a situation to demand a specific performance of an unwritten agreement by reason of the prejudice he might receive by the non-execution thereof; but the line of reasoning

and illustration adopted by Lord Redesdale has brought the simple act of admission into the possession within the scope of the principle. What occurs, therefore, in page 150 of this Work, should not be read without regard to the controuling authority of this Decision of the Chancellor of Ireland.

In the note to page 113 of this volume, cases are produced to show that the authority of the agent to treat and contract under the 4th and 17th clauses of the Statute need not be in writing; but I do not recollect that I have adverted to the difference in the wording between the sections regarding contracts, and the 1st and 3d, which relate to actual conveyances, in respect to the agent's authority, which, on the last mentioned occasions is directed to be in writing. This distinction was recognised and established by Lord Redesdale in the same great case of *Clinan v. Cooke*.

When the agent's authority must be in writing.

As I may, perhaps, be judged to have used too much boldness in commenting upon the largeness of Lord Mansfield's doctrine in his views of this great Statute, I am glad to retreat within the shelter of Lord Redesdale's authority, by which I find myself supported in the case of *Shannon v. Bradstreet*, reported in the above collection of Irish Chancery cases (vid. pag. 66.) The case of *Lord Massey v. Touchstone*, which the same Reporters have given in a note in page 67, affords us a pleasing specimen of the legal orthodoxy and judicial firmness of the Irish bench in the manly discriminating opinion pronounced by Mr. Justice Kelly in opposition to the decisions of Lord Mansfield in *Yea v. Bucknell*, and *Goodtitle v. Bailey*, reported by Cowper, and in support of Lord Kenyon's restoration of the law in

the case of *Hodsden v. Staple*, 2 T. R. 684. When the reader is perusing the note in page 275, of this Work, he is recommended to turn to the said case of *Shannon v. Bradstreet*.

Whether
part-perfor-
mance by a
tenant for
life, with a
power of
leasing, of a
parol con-
tract to make
a lease by
virtue of his
power, will
bind the re-
mainder
man.

In which last mentioned case the reader will also find the following material point on the subject of part-performance. If tenant for life, with a leasing power, enters into an agreement by article, to make a lease pursuant to his power, this agreement shall bind the remainder man, for the making of the contract without following it up by an actual lease is to be classed under the cases of defective executions, in which Equity will relieve where they stand on valuable consideration, and not of simple non-execution, in which Equity cannot give relief. Suppose, then, that article had been out of the way, and the contract had rested on parol agreement, could a part-performance by the tenant for life only bind the remainder man? This would raise a question upon the Statute of Frauds, and upon this Lord Redesdale inclined to be of opinion that the tenant for life would be bound according to the extent of his interest, but that the remainder man might protect himself under the Statute; for the ground of the efficacy of part-performance is fraud, and fraud is personal, and could hardly be made to extend to the remainder man.

Of the be-
quest to re-
lations.

In note 27, page 64, et seq. of this volume, I have collected and contrasted the authorities on the effect of a bequest to relations. I had overlooked the case of *Titcher v. Biles*, 1 T. R. 435, on that subject; but my attention has been since called to it by the note of Messrs. Schoales and Lefroy, in page 113, of the above-mentioned collection. The testator

bequeathed to his several relations, A, B, C, &c. pecuniary legacies, and after some other bequests he devised the residue of his real and personal estate to his wife for life, with power for her to dispose thereof by her will "to and amongst all such of his relations as should be living at his decease, in such shares as his wife should think proper." The wife appointed to the lessor of the plaintiff; and one objection to the execution of the power was, that the wife could only give to a relation who would take within the degrees mentioned in the statute of distributions, and that the word 'relations' had received this construction in *Harding v. Glyn*, 1 Atk. 469, and in *Hands v. Hands*, at the Rolls, 24 June, 1782; but the court held the appointment to the lessor of the plaintiff good; that it was a discretionary power, and might be exercised in favour of any one relation; and Lord Mansfield, in giving judgment, observed, that "if the wife had died without making an appointment, it would have been a trust, and would have devolved on the court, who must have been governed by the statute of distributions." In the case of *Mahon v. Savage*, 1 Chan. Ca. in Ireland, Temp. Lord Redesdale 112, it was observed by the Chancellor, that where the bequest is *general to relations*, it must be void for uncertainty, or the court must call in the aid of the statute of distributions to restrain it; and his Lordship recognised the distinction between a discretionary trust for distribution among relations, and a general bequest to and among relations. It was by the same case resolved, that where there is a legacy to the executor to be distributed among the poor relations of the testator, a relation who was poor at the time

of the testator's death, but became rich before distribution, was not entitled. It was further held, that if a poor relation *died* before distribution, his claim was not transmissible to his personal representative; and furthermore, that where a person had power of distribution among poor relations, he might distribute among all poor relations, however remote; but where the court was called upon to distribute, in failure of the person so empowered, it would confine itself to relations within the statute of distributions.

Parol evidence admitted against suppression and spoliation.

To assist the reader's apprehension of the doctrine of admitting parol evidence to show the contents of instruments suppressed, and of the presumption against a spoliator, he is referred to Lord Redesdale's observations in *Bowles v. Stewart*, in the said collection of Irish cases, page 222; and see page 85, of this volume.

As to the relief in equity in cases of defective execution of wills.

To the same judicious compilation above mentioned, I am indebted for the opportunity of referring my readers to the case of *Wilkie v. Holmes*, the perusal of which will afford illustration and confirmation to the distinction drawn in page 331 of this work, on which the principle upon which equity aids the defective execution of a will is supposed to turn. By a settlement, power was given to husband and wife by deed, and to the survivor by will, to be duly executed, to charge the lands settled with 3000*l.* such charge by will to be only for payment of their or either of their debts, or for younger children. The wife surviving, by will executed in the presence of *two* witnesses, charged the estate with her husband's debts and her own debts, and 700*l.* a-piece to two daughters, if her personal estate should be insufficient for those purposes. *Lord*

Hardwicke, Chancellor, was of opinion, that the will was not duly executed within the meaning of the power, but that the court ought to aid the defective execution, in favour of the creditors and younger children, considering their claim as under the settlement, and the mode of executing the power as depending on the settlement, and not on the Statute of Frauds, except as the words duly executed were construed by reference to that Statute. But if this had been a voluntary execution of the power, and not for payment of debts, or other valuable and meritorious consideration, it must have stood on its own ground, and could not have been supported. See the above case under the name of *Wilkie v. Holme*, 1 Dick. 163.

In page 126, the Reader will find, that on a slender foundation (being the only one which existed when that page was written) I have supposed a contract for the growing produce of land, as being made *in prospect of severance*, not to be for any interest in the land itself, and so not to fall within the fourth section of the Statute. A case, however, was determined last Trinity Term, in the Court of King's Bench, (*vid.* 6 East, 602, *Crosby v. Wadsworth*) which has decided the law otherwise, and placed such a contract within the reach of the fourth section of the Statute, as being a contract, or sale of an *interest in*, or, at least, an interest *concerning* lands. The subject matter is to be considered with reference to the time of the bargain, when the crop was an unsevered portion of the freehold. In the case last above alluded to, it was observed, that the Statute does not expressly and immediately vacate contracts concerning land, if made by parol, but that it only precludes the bringing of actions to en-

force them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof, which description of action, in the contemplation of the Statute does not properly apply to a *collateral* action brought upon the presumed title derived from such parol sale, as an action of trespass, complaining of an injury to the possession of the plaintiff. But it was considered by the Chief Justice, in delivering the opinion of the Court, (and upon that view of the doctrine the case was decided) that though such contract, if executed, is not to be treated as a nullity, and as vacated by the Statute, yet that while it remains executory and in fieri, it is competent to the seller, under cover of this Statute, to retract his bargain, and to discharge it by parol, before any act is done towards carrying the agreement into effect. His Lordship proceeded to give the true reason on which *Poulter v. Killingbeck* (vid. 1 Bos. & Pull. 397) was grounded; the contract in which case, though it originally concerned an interest in the land, ceased to do so after the agreed substitution of pecuniary value for the specific produce: it was, *originally*, said his Lordship, an agreement to render part of a severed crop in lieu of rent; and by a *subsequent* agreement, it was changed to money, instead of remaining a specific render of produce.

* * * *The Reader is recommended, while he is proceeding through this Advertisement, to turn to the corresponding passages in the volume, and make references to the respective additions and corrections, to which his particular attention is above directed.*

PREFACE.

A DIVERSITY of sentiment has prevailed with respect to the utility of the great Statute of Frauds and Perjuries, in relation to some of its provisions. In the much considered case of *Wyndham v. Chetwynd*,^(a) Lord Mansfield declared his opinion to be, that this Statute was not, as had been generally supposed, drawn by Lord Hale, any further than perhaps by his leaving some loose notes, which were afterwards unskilfully digested. And in another place he observes, that, “the Statute was meant to be a guard against fraud, and in theory it seemed to be a strong guard; in practice it might be some guard; but it was his belief, that more fair wills had been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. In all his experience at the Court of Delegates (and he had heard the same from many learned civilians) he never knew a fraudulent will that was not legally attested. Courts of justice ought to lean rather against, than in support of, too rigid formalities.” Lord Camden, a venerable authority, in a subsequent case,^(b) dissented from the opinion of Lord Mansfield, as above stated.

More will be said in a properer place upon the points of controversy in these cases; at present, by way of restoring the equilibrium of authority on the question respecting the general utility of the Statute in

(a) M. T. 31 G. 2. (b) *Hindon v. Kersey*, East, T. 5 G. 3.

this branch of its provisions, let me cite the words of the last-mentioned Chief Justice : “ Many fraudulent wills have been made since the Statute, and all formally executed, no doubt, and I am afraid these frauds will continue to the end of time ; for what law can totally extinguish wickedness, and reform mankind ? But if a law is to be slighted, because it does not entirely eradicate the mischief it was made to prevent, no law whatever can escape censure. Many bad wills have been made, but who can tell how many have been prevented. The design of the Statute was to prevent wills which ought not to have been made, and always operates silently by intestacy.”

There certainly appear to be some inaccuracies in the penning of the Statute. It is observed in a note in Douglas’ Reports,(c) that “ the Statute of Frauds was often supposed to have been made upon great consideration ; on an attentive perusal, however, it would not be found to be very accurately penned ; and to confirm his remark, the writer noticed the variance between the two clauses, prescribing the solemnities necessary to the execution and to the revocation of wills, which will be stated and commented upon hereafter, in the proper place. Intimations of inadvertency in the composition of the Statute have also fallen from the bench.(d) With all its faults, however, it has had the strongest testimony in its favour.

Towards the end of the beneficial life of the late Lord Kenyon, his long experience in courts of equity and law led him to observe, that it was of the greatest importance to preserve unimpaired the seve-

(c) P. 244.

(d) 2 Vez. jun. 662.

ral provisions of the Statute of Frauds, which was one of the wisest laws in our Statute book.(e)

With regard also to the propriety of adhering to the letter of the Statute, some difference of opinion has prevailed among great lawyers. Lord Mansfield, with his usual largeness of doctrine, showed an inclination to make the Statute bend to the principles of natural equity, to which he seemed to think a strict application of the provisions of the Statute was opposed. And it was the remark of Lord Chief Justice Wilmot,(f) that "had the Statute of Frauds always been carried into effect, according to the letter, it would have done ten times more mischief than it has done good, by protecting rather than preventing frauds." In opposition to these sentiments, concerning the effect which ought to be given to the Statute, it should be mentioned and remembered, that Lord Chancellor Cowper declared, that he had always been tender of laying open that wise and just provision which the Parliament had made by this Statute ; and that Lord Hardwicke was of opinion, that courts ought to avoid making large and liberal constructions to take cases out of the Statute of Frauds. Thus, too, the late Lord Kenyon has remarked,(g) that it was extremely to be lamented, that exceptions were ever introduced in construing the Statute of Frauds ; "it is," continued the same Judge, "a very beneficial Statute, and if courts had at first abided by the strict letter of the act, it would have prevented a multitude of suits which have been brought." An observation to the same effect was made by Mr. Justice Grose.(h) And the late Lord Rosslyn declared,

(e) 1 East, 194. (f) 3 Burr. 1921. (g) 7 T. R. 204.
(h) 5 T. R. 63, and 7 T. R. 16.

the bent of his mind to be strongly in favour of the wisdom of the Statute, and at variance with the cases which intrenched upon it. Of which opinion was also the late Lord Alvanley.⁽ⁱ⁾ Any distinction between the courts of law and equity, in construing the Statute, was discountenanced^(k) by an able Judge of the Court of King's Bench, sitting for the Chancellor, though perhaps the fashion of that Judge's legal opinions inclined him to establish this judicial conformity, rather by relaxing the strictness of legal than by narrowing the bounds of equitable interpretation.⁽¹⁾

To this list of learned advocates among the Judges on behalf of the Statute, may be added the name of Sir James Mansfield, who, in the case of *Anstey v. Marden*, 1 New Rep. 132, has declared, that, upon general principles, no one can wish to restrain the operation of the Statute of Frauds.

Such has been the diversity of opinion among these eminent persons, both on the general merit and usefulness of the Statute of Frauds, and on the principle of construction which ought to govern its application. Where great opinions are so balanced, there is less authority to restrain an ordinary man from offering his own.

(i) See his judgment in *Forster v. Hale*, 712. (k) 1 Vez. jun. 333.

(1) The construction of the statute ought unquestionably to be the same in all Courts; but perhaps the learned Judge went too far in assimilating the course of these different tribunals in the application of the Statute. Observe the remarks of the present Chancellor, in the late case of *Cpoth v. Jackson*, 6 Vez. jun. 39.

It seems to be the proper object of every sound system of laws, not only to provide for the protection of right and punishment of injury, but so to improve the very position of society, as that the mechanical impulse of its own interest may propel it in a direction towards faithful and honourable behaviour. When we regard the laws of a state with a reference to their connection with manners, they appear, as a system, to have a sort of moral direction or bearing, and, if the expression may be allowed, a certain order of sympathies impressed upon them by the national character which preserves and is preserved by public opinion and an intelligent self-interest, in a salutary reciprocation of action and reaction.

The laws of England have this moral character, and the feature most remarkable in that character is an antipathy to fraud and deceit. The robust temperament of our early progenitors, while it qualified them to repel violence by violence, afforded them no protection against artifice and circuitry. Their first essays in legislation were directed by their prevailing anxieties; the article of covin was therefore the principal title of their conservative jurisprudence, and their abhorrence of subtlety carried them at once beyond the object of punishment, to the methods of prevention. In the first rudiments of our law was comprised this notable aphorism—that fraud and covin vitiate every title, and even right itself is turned into wrong by circumventing to obtain it. Thus deceit was rendered self-destructive, and treachery its own betrayer; our infant jurisprudence grasped the serpent, with an arm like that of the cradled Hercules. Multiplied opportunities of deceit in this more complex state of society have called for more arti-

ficial modes of defence ; for fraud improves with an equal progress in malignity and in dexterity. Not only fraud, therefore, but the temptation to fraud, and the practicability of its purposes, have been the object of prevention to the more exercised policy of modern jurisprudence, and it has been among its best directed efforts to impose such requisites upon all private transfers of property, as, without being hindrances to fair transactions, may be either totally inconsistent with dishonest projects, or tend to multiply the chances of detection.

Nor does the frequent overthrow of fair transactions, arising from the neglect of these formal requisites, furnish any sound argument against them. If they obstructed commercial negotiations, they would be objectionable on grounds of public expediency ; but partial instances of loss and disappointment to well intentioned individuals (improperly called cases of hardship) imputable to their own negligence, or a confident rejection of the proposed means of their security, are no rational answer to the reason of a rule of public policy and general operation. Formal observances required by law to give notoriety and assurance to the negotiations of property, may, it is true, incumber the transactions they are applied to : society, as it advances, is followed by a lengthening train of formalities : but this exigency of our more complex condition must receive the blame of the inconvenience, while, for the safety produced by these legal forms of authentication, so greatly overbalancing the inconvenience, we are to thank the vigilant caution of our legislators, who have had wisdom to increase protection as the danger has increased.

This object of protection against fraud is greatly promoted by enhancing the peril of exposure, which will often operate to frighten it from its purpose, and may sometimes render a man honest from despair. Something like this way of considering the efficacy of the Statute of Frauds, appears to have suggested to the late Lord Camden his defence of the testamentary clauses against the censure of Lord Mansfield. "The design of the Statute," said that eminent Judge, "was to prevent wills which ought not to have been made, and always operates silently by intestacy." An observation which well explains the true spirit of the act in respect to its clauses concerning wills, and leads to a just comprehension of the reason of its other provisions for authenticating the transactions relating to property. By requiring a more ostensible procedure, disheartening difficulties are thrown in the way of fraudulent dealings, and it is to be hoped, that in some degree our very thoughts are thereby diverted from the contemplation of purposes, the accomplishment of which is removed to so discouraging a distance, and hazarded by so much exposure.

Laws which thus proceed on a principle of prevention in their primary operation, and aim at the destruction of artifice by the silent subtraction of its means, may be expected to have some influence upon the habit of the mind, and to infuse some portion of health and vigour into the system of public morals. But the success of such preventive laws principally depends upon the uniformity and precision with which they are administered. Where a legislative provision looks straight at the suppression

of notorious offences by regulations and penalties of obvious expediency, ambiguity of interpretation and a wavering apprehension on the part of the subject of his civil duties, do not always result from occasional relaxations of legal strictness in favour of particular cases of hardship or compassion; but where a law is made with an indirect application to the exigences of society, imposing a positive rule, in itself indifferent, and of which the wisdom is discernible only in its oblique and ultimate tendencies, if the rule be once loosened from the letter of the Statute, it serves only to distress legal questions with fluctuating criteria, and may convert provisions which were designed to assist truth with testimony, and to promote simplicity of dealing, into a prolific source of technical niceties and abstruse distinctions. An administrator of the laws ought not to aim *phainesthai philanthropoteros tou nomou*; for the true compassion of the law is to prevent cases of compassion from recurring. That indulgence is but treacherous lenity, which, by departing from known rules, leaves men in uncertainty as to means of their security, and destroys confidence by the misdirection of feeling.

It was said by Lord Hobart,^(l) "that it is better to admit a mischief in particular, even against the law of nature, than an inconvenience in general." And by a living Judge of equal reputation, the spirit of our Statutes against fraud has been well defined with his own characteristic grace of expression :^(m) "It certainly may happen, that a *bona fide* case may

(l) Hob. 224.
Cases, 221.

(m) Robinson's Reports of Admiralty

incur the penalty of the law, and may become the victim of a general policy anxious to prevent the possibilities of fraud, and, therefore, active in preventing modes of dealing which are grossly liable to abuses of that kind, though the particular transaction may not be directly impeachable."

• To have the sanction of *such* men in support of the general credit of these laws for the prevention of fraud, and of the principle upon which the adjudications upon the Statute in question will, in the succeeding pages, be attempted to be explained and criticised, was an object of importance to the Writer. And with such sanction he seals his observations on this head.



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ADVERTISEMENT,

BY THE AMERICAN PUBLISHER.

THE present edition of the valuable work of Mr. Roberts on the Statute of Frauds, will be found, on comparison, in many respects superior to the London copy. Several typographical errors have been corrected, and many erroneous citations have been rectified. To prevent any confusion hereafter, in referring to this work, the pages of the London edition have been carefully preserved throughout.

BOOK I.

ON THE PROVISIONS OF THE STATUTE, WHEREBY WRITING
AND SIGNING ARE MADE NECESSARY TO THE VALIDITY
OF INSTRUMENTS.

CHAPTER I.

*General Introductory Observations on the Admissibility of Parol
and Extrinsic Evidence.*

PART I.

AS some of the leading and most efficacious provisions of the statute of frauds and perjuries, have for their object the exclusion of parol evidence on certain subjects, and as it is intended to treat of these branches of the statute in a consecutive order, for the sake of the connection and analogy between them, and to make them the subject of the first of the two books into which the whole work is divided, a preliminary discussion, such as the title of this chapter announces, seemed very proper to prepare the reader for understanding the effect of this part of the statute upon the science and practice of the law.

Before the statute of the 29 Car. II. was enacted, few contracts or dispositions relating to real or personal property, were required by our laws to be in writing. The alienation *inter vivos* of property lying in grant, as rights and future interests, and that species of real property *to which the name of incorporeal hereditament applies, was always authenticated by the legal solemnity of a deed. The 32 H. 8. c. 1. which gave to the owners of lands a partial power of disposing of their estates by will, directed such will to be declared in writing; but, until the great statute of which we are treating was passed, no contracts needed, except where some customary law interfered, a written testimony of their existence, and the transfer even of estates in land was complete by a symbolical delivery in the presence of the neighbours, without any written instrument of authentication, however usual and useful the precaution might be of recording the transaction, by what was termed the charter of feoffment.

Of the effect of writing in validating contracts in the civil law and in our own.

In the case of *Pillans and Rose v. Van Mierop and Hopkins* (a) it seemed to be the opinion of the bench, that where the contract was in writing, the necessity for any valuable consideration for its support was superseded, and it was asked by Lord Mansfield, whether any case could be found wherein the undertaking holden to be a *nudum pactum* was in writing. The decision of the judges however, in that case, was grounded on their common opinion, that the promise in question was in fact supported by a valid consideration. But Mr. J. Wilmot went at large into some collateral reflexions upon the case, and declared an opinion (after stating that opinion to be the result of considerable inquiry), that the notion of *nudum pactum* came into our law from the civil law, for which he cited Vinnius in his third book, tit. de Oblig. 4to edit. 596. But with due respect to so high an opinion, we may be permitted to doubt whether, though the maxim of *ex nudo facto non oritur actio*, may in phrase be an echo to the civil law, the *nudum pactum* was understood in that law as it is in our own.

* [3]

The *obligatio ex contractu* in the law of Rome, seemed, in no case, to owe its validity to the consideration. The stipulatory forms indeed, necessary by that law to render the promise binding where the contract was *in verbis*, seem to have been invented to answer the same purpose, as the consideration in our contracts—to shew the engagement to have been entered into with deliberation and reflexion. This coincidence in the *object* has, perhaps, led to the inference of a similarity in the *modus* whereby it is endeavoured to be effectuated. How far and in what cases writing gave to an agreement the quality of an actionable contract in the civil law, is an inquiry not materially connected with the present subject; it may be observed, however, that although obligatory contracts are usually distributed by the Roman jurists under four denominations, viz. such as are contracted *aut re aut verbis aut literis aut consensu*, yet the *obligatio literarum* seems to have been only binding by virtue of the confirmation afforded by the writing as *testimony* of a valuable contract, and not as operating by its intrinsic force or instrumental solemnity. (1) So that

(a) 3 Burr. 1663.

(1) As far as I have found leisure to consult the commentators of the civil law, I have not been able to discover any clear ground for the observations on this head, made by Mr. J. Wilmot in the case cited in the

in deriving "the efficacy of a written instrument in our law from the example of the Imperial institutions, we assume a fact in respect to the civil law itself, not agreeable to the expositions of its

* [5]

text. I find no authority for saying, that in any stage or period of the Roman jurisprudence, a promise or contract, by being committed to writing, derived its obligatory force, exclusively and purely, from that circumstance. "*Ex scriptura non nascitur obligatio et actio, sed probatio tantum desumitur quod aliud negotium ex quo obligatio et actio nascitur inter actorem et reum intercesserit.*" Heineccius *Elem. Jur. lib. 3. tit. 22. de literarum obligationibus*. And from the Commentaries of Vinnius, lib. 3. tit. 22. we may collect by a careful perusal—that the *literarum obligatio* then takes place when a person by a writing, delivered by him to another, in virtue of their mutual consent, confesses that he has borrowed and received from him to whom he so delivers it, a certain sum which in fact perhaps he has never received, and hath suffered two years (formerly five years, but reduced to two by Justinian) to elapse without retracting his confession. With these circumstances of corroboration, a writing may become binding *per se*; nor is it necessary, that, to have this force, it should be authenticated by any public act or notarial solemnity. Any written instrument, accompanied by the circumstances above mentioned, was possessed of this binding efficacy. But then it must be founded on mutual consent, *nam sine conventionione nulla ex contractu obligatio*; and it must contain an express confession of a debt, and that not of any debt, but of a debt arising from a loan, and the ground of the debt should be set forth. And by the same author it appears, that the true distinction, as to their force and operation, between writings containing this acknowledgement of a debt arising upon a simple borrowing, and those which acknowledge debts arising out of other transactions is this—that the instruments comprising an acknowledgement of the latter species of debt, were always *prima facie* evidence, so as to throw the inception of proof on the adversary, and indeed, to render that proof more onerous by requiring an evidence of the same kind to oppose the *prima facie* presumption it created; in which case the written document was never conclusively binding, but stopped at a high degree of *presumptive* evidence; whereas, where the ground of the debt confessed by the instrument was *money borrowed*, the writing did not simply operate as *evidence*, but if valid at all, was of uncontrollable efficacy. If a confession of a debt arising upon a loan, included in the written instrument, remained for two years unretracted, it became absolutely binding and conclusive, but within this space of two years, the inference of law was easily turned against it. If, therefore, in such a case the debtor, within the two years, defended the action by a simple denial or the *exceptio non numerate pecunie*, the burthen of proof

best commentators. Writing is certainly a *very rational evidence to establish the existence of the contract it expresses, but whether the contract, when proved, affords a legal ground for

was cast upon the prosecutor—*que exceptio præter naturam aliarum omnium [literarum] onus probandi transfert in creditorem.*

The presumption under such last mentioned circumstances was in favour of the defendant who had given the security, and was founded, as the book explains it, upon the frequency in practice of giving a security before the money is actually received, for indigence draws after it dependence, and where men are asking a loan, they find it expedient to conciliate the lender by manifesting a confidence in his probity, and are apt, therefore, by way of inducement to him to part with his money, to tender him a security before hand. Which presumption, says the commentator, does not arise in other transactions whereby debts are created, the indigence of the party not being the usual cause of the debt. But after a lapse of two years, without retraction or denial, by exception, renunciation, or protestation, the situation of the parties, where the debt arose by borrowing, was wholly altered, and it became a matter no longer questionable, whether the money was or was not actually lent, but the writing became of itself binding in law, and an example of what, in the language of the Civilians, is properly implied by *obligatio literarum*.

The other obligations *que re aut verbis aut consensu contrahuntur*, stood in no need of the *scriptura* to give them effect: their constitution was perfect without it: the writing might conduce to the manifestation and proof of them, but made no part of their obligation. To this effect is the text of the *Institutes de obligationibus ex consensu*, "*non scriptura opus est ut substantiam capiat obligatio*," on which the commentator observes, "*quod vero in his etiam scriptura sæpe adhibetur, ideo fit, ut facilius probari possit, quod actum est, non quod ad substantiam contractus obligationisve constitutionem, scriptura pertineat.*" To have a clear and accurate comprehension, therefore, of this *obligatio literarum*, we must consider it as confined to the case of loans, which must be stated in the instrument as the cause or ground of the debt. In other cases of debt, the writing operates as presumptive evidence, as well before as after the expiration of the two years from the date of the writing, so that, with respect to them, the *exceptio non numerate pecunie* can not at any period be received, unless seconded by the most evident and cogent proofs.

Acquittances and discharges in writing, are not instances of the *obligatio literarum* in the civil law. These are held by that law as prevalent proof of payment, but to become plenary and *omni exceptione majoris*, they must be unimpeached for 30 days. So again, where the *emptio et venditio* or bargain and sale is committed to writing, the contract is considered as receiving its perfection from the consent of the

compelling the performance, is a question, as it seems, to be determined in the civil as well as our own law, by a species of evidence, which, according to their respective rules of judging, is demonstrative of the serious intention of the party to become bound by such promise.

It appears from these considerations, that the analogy on this subject between the two systems of jurisprudence has been taken up with some precipitation, and that in prosecuting the parallel with a proper regard to the genius and progress of their respective rules, we should perceive, that although in both institutions the same object is in view, the fixed criteria are essentially independent of each other, and that what is aimed at in the one system by stated words and forms of phraseology, or perhaps in some cases by declaration in writing, can be effected only in the other by the existence and evidence of a sufficient consideration, or by the solemnity of a deed or record. The observations occurring on this subject in the Commentaries of Plowden,^(b) and which were alluded to by the Bench in the above cited case of Pillans and Rose v. Van Mierop and Hopkins, though in expression they lay much stress upon the legal validation of a contract by a written instrument, are not applicable to the mere question, whether in our law the circumstance of a contract's being committed to writing, dispenses with the necessity of a consideration for its support; since all the instances produced to warrant the observations in that book, are cases of writing sealed and delivered.⁽³⁾ And indeed, if the old books furnish no instances wherein a writ-

*[7]

That the distinction in our early law

(b) P. 308--9.

parties, unless it was originally part of the agreement, that the contract should be promulgated in writing. "*Nisi inter contrahentes convenerit ut emptio et venditio in scripto celebretur.*" Then indeed it became necessary, that the contract should not be held perfect unless complete in every part. But the essence and constitution of this contract was not changed; it still remained *contractus consensualis*, though the consent, according to the stipulation of the parties, was required to be manifested by a written memorial.

(3) "The reason is, says the book above cited, because it is by words which pass from men lightly and inconsiderately, but when the agreement is by deed, there is more time for deliberation. Thus when a man passes a thing by deed, first there is the determination of the

books is always between contracts by deed and by *parol*; and no difference is made between verbal and written agreements, unless sealing and delivery supervene.

ten promise has been held to be a *nudum pactum*, it is perhaps in part ascribable to the rarity of the talent of writing in early times, but more to the silent allowance of universal opinion, which occasioned the omission of any mention, in the decision or relation of a case, whether the promise was in writing or not, where it had neither the solemnity of a seal, or the support of a consideration to establish it.

The question, therefore, put by the Bench in the abovementioned case seems a little extraordinary, when we advert to the great experience and knowledge of the Judge from whom it fell. It is in the judicial practice of every day to inquire into the consideration of a promissory note, where the question is simply between the original or immediate parties; and I apprehend it to be well understood, that the statute of frauds has made no manner of alteration in this respect, but that the writing and signing required by that statute to evidence particular contracts, has left standing the same necessity for a consideration to support and uphold them as existed before the statute. A case occurs in *the notes to the 7th volume of the Term Reports,^(c) which forcibly illustrates and confirms what has above been laid down.—The opinion of the Judges, as delivered to the House of Lords by Lord C. B. Skinner, is so pointed, explanatory, and concise, that, on this occasion, the writer has judged it most for the interests of his readers, to present them with a transcript of the judgment delivered.

“It is undoubtedly true,” said the Chief Baron, “that every man is by the law of nature bound to fulfil his engagements. It is equally true, that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last mention-

(c) P. 350. Rams and another, executors of Mary Hughes v. Isabella Hughes, administratrix of John Hughes, in error. Dom. Proc.

mind to do it, and upon that he causes it to be *written*, which is *one part* (note the expression) of the deliberation, and afterwards he puts his *seal* to it, which is another part of the deliberation, and lastly, he *delivers* the writing as his deed, which is the consummation of his resolution.” And see Countess of Rutland’s case, 5 Rep. 26 a.

ed sense only that it is to be understood in our law. The declaration states, that the defendant being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant *generally*. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration, unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person, indebted in one right, in consideration of forbearance for a particular time, promised to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right. But here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request *in another right, I derive no advantage or convenience from this promise, and therefore, there is not sufficient consideration for it. But it is said, that if this promise is *in writing*, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put into writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will be presumed that it was in writing; and this last observation is certainly true; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England.

* [9]

All contracts are by the laws of England distinguished into agreements by speciality, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, *as contracts in writing*. If they be merely written and not specialities, they are parol, and a consideration must be proved.

It is said, that the statute of frauds has taken away the necessity of any consideration in this case; but the statute of frauds was made for the *relief* of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. The words of the statute are merely negative, and executors and administrators are not made liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and sign-

ed by the party. But this does not prove that the agreement was not still liable to be tried and judged of as all other agreements, merely in writing, are by the common law, and does not prove the converse of the proposition, that "when in writing, the party must be at all events liable."

* [10]

Rule of the common law with respect to the inadmissibility of parol evidence to alter the effect of instruments in writing.

But though the ceremonies of writing and signing have in a multitude of cases been made necessary by the statute of frauds ; and the law, since the passing of that act, has *entertained a greater jealousy of any attempts to add to or alter the effect of a written instrument by parol testimony, yet the *common law*, in laying so much stress upon the consideration of contracts, has not overlooked the propriety and importance of guarding the chastity of written instruments. And it was always held, before the act of Charles the Second superadded its positive restraint, that a writing, whether under seal or not, was not to be added to, controuled, or contradicted by unwritten words.(a) Thus it was observed by Lord Dyer, that "men's deeds and wills, by which they settle their estates, are the laws which private men are allowed to make, and they are not to be altered even by the King in his court of law or conscience. We must take it as we find it." And it was said since the statute by another great man,(b) that "it is not only contrary to the statute but to common law, to add any thing to a written agreement by parol evidence."

Of the general criterion by which the question whether parol evidence is to be admitted or not, is, in the majority of cases, capable of being decided.

The statute of the 29 Car. II. has enhanced the duty of caution in admitting verbal testimony to add to or alter written instruments, in the cases falling within its provisions :(3) And it should seem that, if at the common law, where writing was not necessary to the validity or *proof* of the contract, courts were so cautious of permitting parol evidence to vary or controul its import,

(a) See *Brett v. Rigden*, Plowd. Comm. 345. 3d point, where the objection to the verbal evidence was grounded on the words of the statute of Wills, 32 H. 8. c. 1. & 34 H. 8. c. 5.

(b) By L. Hardwicke, 2 Atk. 384. 3d edition. See also 2 Blackst. 1249. 1 Vez. jun. 241. and Lord Cheyney's case, 5 Rep. 68.

(3) The authorities for this observation are innumerable. I shall set down only the following as sufficient for my own and the reader's purpose. 2 Blackst. 1249. *Preston v. Merceau*, 2 P. Wms. 420. *Nicholls v. Osborn*, 3 P. Wms. 51. *Chester v. Chester*. *Hare v. Shearwood*. 1 Vez. jun. 241.

a more abundant reason for the same caution arises out of the statute of frauds, which has rendered certain contracts remediless at law without writing. But as it has long been too late to say that no such evidence shall be admitted, the judges have been called upon for the exercise of their soundest discretion in establishing practical criteria for its rejection or admission. The rule of distinction commonly resorted to in these cases, turns upon the tendency of such evidence to contradict, vary, or add to, or only to explain and elucidate an instrument—a rule very good and intelligible in theory, and if not universally easy of application, yet fully adequate to the resolution of a great majority of the cases. Its application is well illustrated in the case of the King against the inhabitants of Lalndon.(d)

*[11]

The question in which case was, whether the written agreement should be considered as a contract of hiring and service, or a contract of apprenticeship, such agreement not having the word apprentice in it, but beginning with the following words : " I, J. M. do agree with J. C. to serve me three years to learn the business of a carpenter." The court permitted parol evidence to show, that the pauper paid a premium to be taught the trade, and was not to be employed in any other work than that of a carpenter. For this parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact, the instrument being equivocal without that explanation.(4)

(d) 8 T. R. 379.

(4) This appears certainly to be the safest and solidest criterion upon which to determine the question of the admissibility of parol evidence in the case of wills. Other distinctions have been sometimes adverted to, which tend rather to set the question afloat, being established on no principle of consistency or analogy. Thus, in the case of *Gainsborough v. Gainsborough*,* it was said by one of the Lords Commissioners, that much rather may parol proof be admitted as to personal estate than land; and in *Beaumont v. Fell*,† Sir Joseph Jekyll thus expressed himself : " It is true, if this had been a grant, nay, if it had been a devise of land, it had been void, but this being the bequest of a personal thing, it makes it a different case." It seems very difficult to account for this doctrine of a distinction between the subjects of a devise in this particular but by referring it (if we were not restrained by our reverence

* 2 Vern. 252.

† 2 P. Wms. 141.

*[13] But the case of *Hampshire v. Pierce*,^(c) determined at the Rolls by Sir John Strange, sets this distinction, perhaps, *in a clearer light than any others to be found in the books ; the sub-

(c) 2 Vez. 216.

of the name and authority of Sir Joseph Jekyll) to those irregular and momentary flashes, which in the luminous path of a great intellect, will sometimes perplex it with a multiplicity of lights and delusive appearances. It was in compliment (as appears from the case) to the statute of frauds, that this distinction was adverted to in favour of land ; the statute having shown a more peculiar regard to that species of property. But when we consider that the rule is much older than the statute, and that that act has required a will of personal property to be in writing, (except under particular circumstances) the reason of this distinction falls to the ground. A similar distinction was alluded to in the case of *Whitton v. Russel* ;* and in *Hampshire v. Pierce*,† cited above, wherein Sir John Strange, in adverting to a case on a will where the mistake of the name of the devisee had been set right by parol evidence, observed, that he was not certain whether it was real estate or not ; to which it was answered from the bar, that the rule was the same whether the estate was real or personal : And I humbly conceive, that the answer was right according to the best legal opinions of the present day.

If the principles of a writer sometimes oppose him to a great authority, he must nevertheless go whithersoever they lead him, or he will be opposed to *himself*. Thus, I am forced also to question the propriety of a distinction taken in *Preston v. Merceau*,‡ by a most respectable judge. In that case parol evidence was offered to prove an additional rent payable beyond that which was reserved in the written agreement for the lease ; and the words of Blackst. J. were upon that occasion as follows : “ We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters it may be otherwise. It might be shown who is to put the house in repair, or the like, concerning which nothing is said. But we cannot, by parol evidence, shorten the term or alter the rent.” To say what are the main objects and what are collateral matters in a deed, seems to be judging for the parties in a circumstance fit only for their own appreciation, and if the endeavour of the law, both in the rule and the statute, was to exclude fraud and perjuries, why the protection of these barriers is to be withdrawn from the incidental and accessory parts of an agreement, which may nevertheless have been a vital constituent of the original motive and consideration, because they are not

* 1 Atk. 448.

† 2 Vez. 216.

‡ 2 Blackst. 1249.

stance of it is as follows : A testatrix, by her will, gave two legacies, the one of 100*l.* the other of 300*l.* in the following manner, " I give and direct 100*l.* to be paid by my trustees to the four children of my late cousin Elizabeth Bamfield, equally to be divided between them : if any or either of them should happen to die under 21 or unmarried, their share or shares shall go to the survivors of them." The other legacy was worded thus, " I further give unto the *children* of my late cousin Elizabeth Bamfield, 300*l.*" At the time of the making of the will there were two children of Elizabeth Bamfield by Poddlecomb, her first husband, and four by Bamfield, and all the six survived the testatrix. It was insisted, that parol evidence should be read to show that the testatrix meant the four children by the second husband in both the above mentioned bequests. But the Master of the Rolls observed, that the two parts of the case fell under quite a different consideration ; *that he had always taken the distinction as to admitting parol evidence to be, that in no instance it should be admitted in *contradiction* to the words of a will ; but if the words of a will were doubtful and ambiguous, so that unless some reasonable light were let in, it would fall to the ground ; any thing to explain, not to contradict the will, was always admitted. As to the 100*l.* legacy, she had six children, and though it was not material whether they were by one husband or the other, yet it was a proper ground to admit an explanation upon, as to what four children were meant : but as to the 300*l.* the devise was so expressed as to take in the whole of the children : the will was positive as to that, and there was no ambiguity at all. The evidence being read, his honour further observed, that he should have entertained some doubt as to the legacy of 100*l.* if it had not so entirely corresponded with the situation and circumstances of the family at the time. Here were not six children by one and the same husband, as it was in *Tomkins v. Tomkins*, but two

*[14]

the governing object of the instrument, seems difficult on any sound principle to explain. The branches of a tree, though collateral to the trunk, do yet derive their life and energy from the same root ; so the principal subject matter of an agreement springs not more from the intention of the parties, which is the root of the transaction and the source of interpretation, than the collateral matters, which, in the judgment pronounced in the above case, were treated with so much indifference.

broods of children by different husbands, therefore it was natural to understand the testatrix as pointing by the number four at the particular brood answering to that number. That it was in evidence that the testatrix declared, that she had provided for Mrs. Bamfield's four children, and that she would not give to the other two, being the Poddlecombs, because their father had provided for them. But that the other legacy stood on a very different foundation; and his honour thought himself not warranted (whatever one might suggest to oneself, to be the intent) to depart from the words of the will, which, beyond all dispute, took in all the children of Elizabeth Bamfield, so that he could not construe it restrictive to the four; for which, however, there might have been some foundation, had there been any words of reference of any sort to those four children, for whom the 100*l.* was designed, but there were none throughout. That it was dangerous, in questions of this nature, to depart from the plain words of a will, or to admit any evidence to contradict them: therefore, he said,

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he admitted the evidence as to the 100*l.* but would not apply it to the other—in the one case it being only explanatory, in the other contradictory.

PART II.

Ambiguities.

Of the distinction between latent and patent ambiguities.

IN analogy to the principle on which parol evidence is admitted to explain but not contradict or enlarge the import or expression of an instrument in writing, a distinction runs through the cases between latent and patent ambiguities; the technical and almost figurative conciseness of which phrases places them above common apprehension; for in ordinary language are not all ambiguities latent, and what ambiguities can be patent or manifest? It may therefore be assisting to the professional beginner in this place, to attempt an explanation of these phrases. An ambiguity is properly *latent* in the sense of the law, when the equivocality of expression, or obscurity of intention, does not arise from the words themselves, but from the ambiguous or deliquescent state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the

written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of—an ambiguity is patent when it is produced by the uncertainty, contradictoriness or deficiency of the language of an instrument, so that no discovery of facts or proof of declarations can restore the doubtful or smothered sense without adding ideas which the actual words will not of themselves sustain.⁽⁵⁾ It follows from this explanation, that the statute of frauds, which, in this particular, is declarative and corroborative *of the rule of the common law, virtually forbids in the cases within its provisions, the resort to extrinsic proof, in those instances wherein the ambiguity is patent: but that where the ambiguity is only latent; as, in such case, the object of the collateral testimony is only, by a comparison of the words of the instrument with external circumstances whether consisting of facts or declarations, to attach a meaning and applicability to expressions within the limits of their grammatical or legal acceptation; the statute seems in no danger of violation by the admission, for these purposes, of this species of proof.

* [16]

The instance most frequently chosen as the example of the *ambiguities latens*, is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty.^(c) The case put by Lord Hobart was that of a devise by a testator to his son John, having two sons of that name; and the same Judge having a little above decisively declared, that a testator's intent must be expressed in a will written, that it may be certain to the court, observed on the case just put, that an averment should make this, *i. e.* who was designed by the testator, certain. The case and the comment contain together a true description of the *ambiguities latens*, to constitute which, there ought to be a positiveness, a certainty and integrality of verbal expression, becoming ambiguous in sense by the discovery of a matter not appearing in the instrument. This is the ambiguity

(c) See 5 Rep. 68. Lord Cheyney's case, Hob. 32. Couden v. Clark, 3d point, and 1 Salk. 7. Lepcot v. Brown.

(5) If I have not the good fortune to be intelligible, I refer the reader to Lord Bacon's Maxims, 99. and Sir Thomas Raymond's Reports, 411.

latent, which, as it is generated by facts, so it is removeable by a further investigation of facts or matter extrinsic.

Of mistakes
in the names
of persons.

* [17]

Name mistaken, where the name used happens to belong to a person in being, and who might be in the testator's contemplation

The names of persons appointed to take under wills,^(f) have, on the same principle, been set right by parol evidence, *where both the christian and surname have been mistaken; nor does the statute appear to be violated in this instance, any more than in that mentioned above; for in such case no words are *supplied or substituted*, but the mistaken appellation in the instrument is applied to the person really intended by it, and the names of persons having no intrinsic meaning, the will is rectified without any alteration of the sense. A distinction, indeed, occurs between such mistaken use of a name, which, though a wrong appellation of the object of the testator's bounty, happens to belong to an existing person within the range of the testator's knowledge and possible contemplation; and that of a name under which there is nobody to claim as fortuitously coming within its literal description. Thus, in *Beaumont v. Fell*,^(g) where the point arose upon a bequest in a will to Catherine Earnley, and the name of the person who claimed the legacy as the real object intended to be benefited was Gertrude Yardley, it was first shown by her, and admitted, that no person called Catherine Earnley claimed the legacy, and then evidence was offered to show that the scrivener, who took instructions for drawing the will, had made the mistake. The court established the claim of Gertrude Yardley,^(h) but not without observing how very material it was to the case that no such person as Catherine Earnley claimed the legacy.⁽⁵⁾

(f) And see *Hodgson and Caldecot, v. Fitch and Another*, 2 Vern. 393.

(g) 2 P. Wms. 141.

(h) *Edge v. Salisbury*, Amb. 71. *Gines v. Kemsley*, 1 Freem. 293. *Dorset v. Sweet*, 1 Amb. 175. 1 Vez. jun. 266. *Parsons v. Parsons*, and see particularly the case of *Del Mare v. Rebello*, 3 Bro. C. R. 246.

(5) In the case of *Del Mare v. Rebello*, 3 Bro. C. R. 246. the devise was to the children of the testator's sisters, Estrella and Reyna; Estrella had sisters, Reyna had none, and had changed her name, and become a nun professed. But testator had a third sister, Rebecca, who had children. The Chancellor would not substitute the name of Rebecca for Reyna.

On the other hand the Court of K. B. treated the case of Doe on the demise of Hayter v. Joinville,⁽ⁱ⁾ as affording an instance of an incurable ambiguity. A testator having devised to his wife's *family* one moiety of his residuary property, and to his brother's and sister's *family* the other moiety, died, leaving a brother and sister living, and both with a numerous issue, as well as the children of a deceased sister. It was judged impossible to construe the will with any rational certainty, so as to make a precise application of the word *family*; and that this was a proper example of the ambiguity patent, as the uncertainty was inherent in the term itself, which, unless the context of the will had defined its applicability, could scarcely receive explanation from any extrinsic circumstances.⁽⁶⁾ Again, where a testator devises to 'one of the sons of J.S.'^(k) who has many sons, no regard can be paid to any thing extraneous to the will, as the medium of expounding the testator's intention.⁽⁷⁾ It is true, in the last instance, the ambiguity does not fully display itself till from the words of the instrument the attention is directed to the predicament of the object to which the words apply, since, if in point of fact there was but one son, that son would be entitled; but still it is obvious, that the reference to external facts (if there were more sons than one) would confirm the patent ambiguity, already attaching upon

What ambiguity is created by a devise to a person's family;

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or to one of the sons of J. S.

* [19]

(i) 3 East Rep. 172.

(k) 2 Vern. 625. Amb. 175. 2 Mod. Cas. in Law and Equity, 122.

(6) But it has since been held in the court of chancery, that the word 'family' imports as definite an object of a devise as the word 'relations,' in respect to which the court of chancery has, upon grounds of convenience, adopted the rule of the statute of distributions: so that it seems a bequest to the 'family' of another person, after the decease of such person, will be executed by the court in favour of his nearest of kin. *Crewys v. Colman*. Vez. jun. 1 vol. N. S. 319.

(7) Where a testator gives the same legacy in different parts of his will to the same persons, it is an ambiguity which, unless helped out by some rule of construction, no extrinsic evidence can be received to explain. And if any settled rule of construction will apply, no parol evidence as I conceive ought to be received, to contradict it. As to the existence of any and what rule of construction in this case, there has been a great contrariety of opinion. See 2 Atk. 373. 3 Atk. 493. *Flowd. Comm. English edit.* §41, margin, where all the authorities are collected.

the words which in themselves express uncertainty, and suppose a plurality of individuals equally included within the *terms* of a gift intended for one only, and therefore present an ambiguity in the very face of the will.(8)

Of the distinguishing characteristics of a patent and latent ambiguity.

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If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of it, extrinsic evidence cannot remove the difficulty, without putting new words into the mouth of the testator, which, in effect, would be to make a will for him : but if a will presents no ambiguity independently of facts, the uncertainty which arises must come from behind the instrument, and is, in this consideration of the phrase, with propriety called a *latent* ambiguity ; *and indeed to a certain extent extraneous evidence must be resorted to in establishing the title under any devise, since, let the words be ever so clear, the person designed can only bring himself within the description *in foro contentioso*, by proof of his identity.

The late Chief Justice of the King's Bench, in the case of *Thomas v. Thomas*, 6 T. R. 676, makes this observation : "It

(8) I have transcribed the following note from *Edward Altham's* case, 8 Rep. 155, as furnishing several examples illustrative of the part of the subject above treated : " If A. levies a fine to William his son, to have and to hold to him and his heirs ; upon this fine the judge cannot make a question of any matter of law ; but now the party comes and avers in fact, and says, that A. had two sons, named William, an elder and a younger, and that his intent was to levy the fine to William the younger ; this averment out of the fine is good of this matter of fact, which well stands with the words of the fine, and shall be tried by the country. But if a man by deed gives goods to one of the sons of J. S. who has divers sons, here it shall not be averred which son was intended ; for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of S. or of the manor of D. to two *et heredibus*, and in truth there is the manor of North S. and South S. or Great D. and Little D. in this case issue may be taken *dehors*, which manor the donor intended to pass, for that is matter of fact, not apparent in the fine, whereof the judge cannot take cognisance ; but it stands well with the fine, and shall be tried by the jury. But where the words whereby the estate is limited are to two *et heredibus*, that is apparent in the fine, and by judgment of law, these words, *et heredibus*, are uncertain and void, and no averment *dehors* can make that good which, upon consideration of the deed, is *apparent* to be void."

has been a long established rule, that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain, which, without the aid of such evidence, is uncertain; but here the evidence has itself raised the ambiguity; on the face of the will there is no uncertainty." This passage seems to imply, that where there is no uncertainty on the face of a will, but the evidence *raises* the ambiguity, the case is incurable. Possibly, however, his lordship did not mean to be so understood,⁽⁹⁾ since there would be senseless tautology *in the phrase of *latens ambiguitas*, unless it imported an ambiguity not existing on the face of the instrument, but lying *behind in the dubiousness of the objects to which its provisions were directed, and therefore capable only of being exhibited by reference to those subjects through the medium of external evidence. The word *latent*, as a mere emphatic or descriptive, and not a distinctive epithet, would be an example of the most imbecile verbosity; while the opposite phrase of *patent* ambiguity, being deprived of its correlative, must also lose its discriminative force, and become perfectly unintelligible and contradictory. The truth will be found upon consideration to be, that the state of facts *raises* the *latent* ambiguity,^(l) and may also *dissolve* it; but the *patent* ambiguity resides in the amphibology of language, the vagueness of description, or the vacuity of expression, and can be expounded only by the context and general sense of the instrument. *Thomas v. Thomas*,^(m) above referred to, was a case of the *ambiguitas latens*, wherein the words of the will comprised a clear and certain description, but the parol or extrinsic evidence raised the doubts, and produced circumstances to suspend *in equili-*

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(l) 1 Bro. 85.

(m) 6 T. R. 676.

(9) Though the ambiguity which is raised by state of facts *dehors* the instrument is called the latent ambiguity, and that which is produced merely by the words of the instrument, is denominated the ambiguity patent; and it is generally said with truth, that the species of ambiguity last mentioned excludes, and the former admits, parol and extrinsic evidence; yet, upon a close attention to the examples in the books, we shall find that the discriminating line is very difficult to be drawn in many instances, and we shall be forced to allow, that there is an ambiguity answering to the terms of the description of a latent ambiguity, which, nevertheless, partakes of the character and consequen-

Of the mixed case of latent and patent ambiguity.

hinc the inferible intention of the testator. The state of facts in that case displayed the latent ambiguity ; which facts were shortly these.

ces of an ambiguity patent. Thus, if by a reference to external circumstances the intention of the framer of, or parties to, an instrument is not only thrown into doubt, but the language used becomes irreconcilable and contradictory, so as to be incapable of expressing any intention with certainty ; this sort of ambiguity, whether denominated patent or latent, is such as will not yield to any evidence of extraneous and collateral declarations. The case of Lord Walpole v. Lord Cholmondley,* may help to explain what is here meant to be conveyed. The deviser had made a will in the year 1752, and another in 1756 with a difference from the former in respect to the limitations of the real estate, without disposing of his personalty, or appointing executors by either ; and by his codicil, (stating that by his *last* will, dated 1752, he had made no disposition of his personalty) bequeathed his personal estate, and appointed executors. A doubt arose upon the production of the two wills, whether the will of 1752 was or was not set up again by the recital of the codicil, which agreed with *that* will in the reference to the date, but with the will of 1756, as being the *last* will in the order of time. External evidence of facts and declarations was offered, to show that the testator had no design of revoking the will of 1756 ; and to enforce the propriety of receiving this evidence, it was contended, that as the ambiguity was introduced by the production of matter *external*, viz. the fact of the existence of the two wills, the one agreeing with the reference in the codicil as to the date, the other answering to the word *last* in the codicil, parol and extrinsic evidence ought to be admitted to explain the doubt, as constituting what is called in law a latent ambiguity. But the judges of the court of King's Bench thought the evidence not admissible, grounding their judgment upon a denial of the existence of any ambiguity at all, the word *last* being, in their apprehension, no counterpoise to the clear reference to the date of the earlier will ; inasmuch as all wills, being ambulatory till the death of the testator, there is properly no *last* will until that time arrives, and his calling his will of 1752 his last will, was only to signify his intention that *that* will should be his *last*. This judgment was not, as has been said, received by the bar with entire acquiescence. It has the humble suffrage of the writer of these pages, who ventures to add, that if the word *last* could have balanced against the reference to the date of the prior will, the ambiguity resulting from these incongruous senses, whether we call it *latent* or *patent*, could not have been explained by the introduction of extrinsic evidence, without

The testator devised lands to Mary Thomas, of Llechlloyd, in Merthyr parish, and it turned out in fact that the testator, at the time of his death, had a grand aunt, of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, *Mary Thomas, an infant, of the age of two years, the only person of that name in the family ; but it appeared that she lived at Green Castle, in the parish of Llangain, at the distance of some miles from Merthyr, in which place she had never been. Here there was a person in existence to answer to the name in the devise, but she was neither the grand-daughter, nor living at Llechlloyd, in Merthyr parish, and there was another person of the family who was the testator's grand-daughter, and of Llechlloyd, in Merthyr parish, but to whom the name did not apply. The judge at *nisi prius* received the evidence (subject to the opinion of the court as to its admissibility) to show that the name of Mary Thomas was inserted by mistake for that of Elinor Evans ; but the jury were not persuaded by it, so that the admissibility of that evidence did not come to be judicially decided. The contest between these claimants, to neither of whom the words of the disposition corresponded, opened the way, by the uncertainty appearing on the parol evidence, for the title of the heir at law. After the jury had found that there was no mistake in the name, the question of course lay wholly between Mary Thomas and the heir at law, or, in other words, the only consideration which remained was, whether the description was applicable, with sufficient certainty, to entitle her as the object of the disposition ; in which shape of the contest the distinction which has been above shown to have been taken in *Beaumont v. Fell*(n) in fa-

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(n) 2 P. Wms. 141.

the sacrifice of judicial consistency. It seems to be a settled and clear principle, that contradictions cannot be explained. To establish what is irreconcilable with itself, we must remove a part, which is not to explain, but to alter. It is true, the uncertainty of language, and the opposite tendencies of different passages, regarding the same thing or person, are frequently remedied in law, by settled rules of construction, as will be shown in a subsequent part of this introduction ; but in such cases, the ambiguity does not come into existence in legal contemplation, and consequently, no question respecting the admission of parol evidence becomes a subject of discussion.

year of these cases of defective dispositions, where the person intended was clearly perceived through the mistake, and no person was in existence to claim under the erroneous description, became very important; for though the jury had put to silence the pretensions of Elinor Evans, the court thought that inasmuch as the description both of place and relationship was applicable to her, such a degree of uncertainty as to the person intended was thereby introduced as was sufficient to exclude the application of the maxim of *falsa demonstratio non nocet*; for that rule will only apply as **constat de persona*.(10) And therefore, as Elinor Evans could not take because nothing but the description or *demonstratio* belonged to her, and there was a person in existence and claiming, to whom the name applied, so neither was Mary Thomas suffered to take under the devise, because nothing but the name applied to her, and the description both as to place and kindred was precisely appropriate to another person in existence and contending for the preference on these grounds.(11)

Of the effects of a false or true description.

It is to be observed, that neither the christian nor surname of Elinor Evans agreed with the name in the will; but where the mistake has only been in the christian name, and the instrument has contained a full and exact description of the person so *imperfectly* designated by name, although there has existed another person *wholly* answering to the name in *both* particulars, the correctness and circumstantiality of the *description* has outweighed the advantage on the other side arising from the coincidence in both the christian and surnames. As where the devise was to the Rev. Charles Smith, of Stapleford Tawney, in the county of Essex, clerk, and the legacy was claimed by the Reverend Richard Smith, of Stapleford Tawney, in the county of Es-

(10) But a true description will assist a wrong name, if there is no other person of the name. 2 Vez. 217. And if there is a certain description, and a further description is added, it is immaterial whether the superadded description be true or false. See *Bradwin v. Harpur*, Amb. 375. Which case presents an instance of a transposition of parties, the legacy intended for one being given to the other, by a very evident mistake of the names.

(11) In this case, the first ambiguity was *ambiguitas latens*, for it only appeared by reference to outward circumstances; but these facts and circumstances, which produced the ambiguity, offered no media for its explanation; and this is the proper description of an incurable latent ambiguity.

sex, clerk; it was contended that one Charles Smith, an officer in the army, who had lived at Rurnford, in Essex, and had been dead some time, was intended, and that so the legacy had lapsed; but it was proved by the widow of Charles Smith, that he died before the testatrix made her will, and upon the court's manifesting a decided opinion against the executor and trustee of the residuary legatee, the point was given up, and a decree was made for the legacy, with interest, but without costs, in favour of the plaintiff, the Rev. Richard Smith. (12) The result seems to be, that wherever an ambiguity arises from the inapplicability of the name or description, as such ambiguity is produced by the state of facts, it is open to explanation by parol evidence, being properly an example of the *latens ambiguas*; but still the evidence, when let in, may increase instead of lessening the degree of uncertainty, or it may fall short of affording that preponderancy of inference, which is requisite to decide the court or the jury.

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Of the incurable latent ambiguity.

Thus much as to mistakes in the names and descriptions of persons, by which it appears, that very wide deviations and mistakes have been corrected by parol and extrinsic evidence; but when a *blank* is left for the name of a legatee or devisee, it is too much to set up an object of the testator's bounty, by any description of evidence. Thus, in the case of *Hunt v. Hort*, (13) where the testatrix directed that her other pictures (having made some previous specific bequest of pictures) should become the property of Lady —, the Chancellor said he could not supply a blank by parol evidence; though there certainly were some strong circumstances in the will itself, to show that Lady Hort was the person intended. But where there was a blank only left for the christian name, evidence was without difficulty read to show the testator's intentions, with regard to the person answering to the

Of the effect of a blank left for the name of a legatee.

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(12) 6 Vez. jun. 42. *Smith v. Coney*; so in *Parsons v. Parsons*, 1 Vez. jun. 266, and in *Garth v. Meyrick*, 1 Bro. C. R. 30. Circumstances weighed in favour of a person imperfectly named against another person to whom the name belonged; but who clearly appeared not to be the person intended, when the circumstances of description, and the facts coming in upon parol evidence, were coupled together.

(13) 3 Bro. C. R. 311; and the same point was adjudged in *Baylis and Church v. the Attorney General*, 2 Atk. 239; and again in *Castleton v. Turner*, 3 Atk. 257. and see *Pym v. Blackburn*, 3 Vez. jun. 457.

surname.(e) And two initials of the person to whom a legacy is given, have been filled up by parol evidence of the person intended.(p)

Some ambiguities *patent* are not incurable.

It must be allowed, that, in the last instance, the rule of admitting parol evidence in the case of an ambiguity latent, and rejecting it when offered to expound an ambiguity patent, becomes a little unsteady in its application. Where a testator gives a legacy to Mrs. G, it is not easy to show that the ambiguity which this imperfect designation creates, is, not an ambiguity arising upon the face of the will, and, as such, an ambiguity *patent*. And I think it will be more for the credit of legal consistency, instead of straining, by any refinement of reasoning, to take this instance out of the description of an ambiguity *patent*, to allow that the rule is flexible to the extent of admitting extrinsic evidence in a few particular cases, where the ambiguity, though *patent*, arises from something short in the expression or designation of the objects of the testator's intention, and is of a nature calculated to receive an easy explanation from outward facts.

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Of the lights reflected upon particular passages by the context.

So in other cases, although the effect of a positive clause(q) is not to be controuled by inference from other parts of the instrument; yet, if the suppletory matter can be collected from the general context of the instrument, whether it be a contract or a will, the *approach* to an ambiguity **patent* in a *particular* clause or sentence, will not exclude the admission of parol evidence, provided it tends to corroborate this collective inference from the context; indeed, *that* can scarcely be termed an ambiguity, which is susceptible of an exposition from other parts, or from the stress and scope of the instrument. And it is generally true, that where the context of the instrument reflects a strong auxiliary light upon an ambiguous passage, but not strong enough to decide the exposition with sufficient certainty, it may nevertheless afford a ground, and indeed invite the admission of extrinsic evidence. Perhaps too we may go a step further, and say, that where such secondary grounds of construction are morally decisive, as may sometimes be the case, it may be doubted, whether any extrinsic evidence can be received to contradict it; for instruments are not

(e) Price v. Page, 4 Vez. jun. 680. (p) Abbott v. Massie, 3 Vez. jun. 148. (q) 8 Vez. jun. 42. Jones v. Colbeck.

to be construed piecemeal, but illustration is to be borrowed^(r) from all the parts of them, to give light and effect to particular passages. In *Ulrick v. Litchfield*,^(s) the ambiguity was also upon the *face* of the instrument, but the scale was inclined from its balance by a bearing in the language of the will; parol evidence was therefore, as it seems, very consistently and properly admitted, to decide the preponderance. The devise in *Castledon v. Turner*,^(t) upon which the question arose, was considered as receiving illustration from the other parts of the will, and from a natural order of preference inferible both from the instrument itself, and from the relation of the persons concerned, so that the particular uncertainty was expounded by a comparison with the general tenor and object of the will; yet the Lord Chancellor seemed to hold, that as it was a case in which there was an absolute omission of a devisee, no extrinsic evidence could be admitted, and the case, as it was regarded by his lordship, did not stand in need of it, there being enough in the will for its own exposition. The point of the case was this: "W. bequeathed his lands to his wife for her life, and after her decease, to M. D. the niece of his wife, and proceeded thus: Item, I give the use of 500*l.* stock for *her* natural life, but after *her* decease, I give the 500*l.* among my wife's brothers and sisters." Lord Hardwicke considered this as a case of the absolute omission of a devisee, and nearly the same as where a blank is left for the name of the devisee, in which case parol evidence is always excluded.

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It does not appear that Lord Hardwicke meant to ground this peremptory rejection of parol evidence upon the rigid adoption and application of the rule of distinction in this respect between *patent* and *latent* ambiguities: he probably looked only at the case of a blank, and to the peculiar circumstances of the case before him: nor does it seem as if the principle of the decision affirmed the doctrine of holding an ambiguity *patent* an incurable uncertainty in *all* cases, unless it can receive an interpretation by inference, exclusively, from the context of the instrument itself, without resorting to *extrinsic* evidence. Perhaps the majority of cases do not come up to this severity of doctrine. Where, upon general and probable reasoning, furnished from the internal evidence of the intentions of parties, the mind is involuntarily led to

Of the effect of the internal evidence.

(r) See *Coker v. Guy*, 2 Bos. et Pull, 565. (s) 2 Atk. 372. (t) 3 Atk. 257.

The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property.

* [29]

give a particular sense to a passage, involved in grammatical obscurity, the general practice inclines strongly against refusing to the already preponderating scale the cumulative aid of external proofs. But whatever doubts may exist, whether in *any* case of a palpable ambiguity *patent*, although an advance be made towards the elucidation of it by reference to *other* parts of the instrument, any accessory light can be borrowed from mere parol evidence, consisting of *words and declarations*; yet, it seems to be settled in practice, that if the court can, from the reflected lights furnished by the instrument itself, gain some probable foundation of conjectural inference, they will look out of the instrument itself to the ostensible and obvious situation of the parties or persons concerned, and permit a resort to the **visible* indications of intention from the position of external circumstances. *Masters v. Masters*, (14) was a strong case decided on this principle. There a testatrix gave a sum of money to *all and every the hospitals*, without saying where the hospitals intended by her were; but because it appeared that the testatrix lived at Canterbury, and moreover, that she took notice by her will of two Canterbury hospitals; the devise was held not to be void for uncertainty, but to have been intended for all the hospitals of Canterbury.

The same practice of looking out of an instrument to the situation of the parties concerned for collecting inferences of intention, appears in the case of *Harris v. the Bishop of London*, (u) which was thus: Talbot Barker being seized in fee of a real estate, as heir on the part of his mother's mother, and being also seized in fee of a very small estate of *4l. per annum*, as heir of his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which, he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side, for ever; and the question was, who should be entitled to the residue of the rents and profits; whether the heir of the mother's father, or the heir of the mother's mother: here the court looked *beyond* the will to the testator's title to the property devised, and finding it to be derived through the mother's mother, decreed it to go to the heirs of the testator on the part of his mother's mother. This will, perhaps, appear, when properly considered, a stronger case

(u) 2 P. Wms. 135.

(14) 1 P. Wms. 420. It appears also by this case, that a blank left in a codicil may sometimes be supplied from the will.

than that just above cited, of *Masters and Masters*, for although the extraneous matter was not introduced to explain an ambiguity patent, since the words of the will displayed no ambiguity at all; yet it was certainly resorted to by Lord Maccliosfield, to annex a meaning to words beyond their legal effect; the "right heirs of the mother's side" being a description properly applicable, in the first place, to the heir of the mother's father; nevertheless, as we have seen, the court gave the estate to the heir of the mother's mother, in deference to the argument drawn from the manner in which the estate had in fact devolved to the testator. And it is to be further noted, that in this case the Chancellor did not look out of the will to the title to the property for the sake of deciding the judgment already inclined the same way by the context of the instrument, for it does not seem that the will afforded any internal evidence.

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But the want of this internal evidence in the will itself, to justify the resort in the last mentioned case, to the external facts, makes the propriety of the last mentioned decision at least *questionable*, if we regard the analogy of authorities on this head; and, perhaps, the admirer of consistency in legal principles will be better satisfied with the inflexibility of Lord Talbot, in deciding the case of *Brown v. Selwyn*(x) which was shortly as follows: John Brown made his will, and after several dispositions of real and personal property, devised as follows: "And as to the rest, residue and remainder of my estate, whether real or personal, whereof I am seized or possessed, or which I am any ways entitled to, I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto, unto such my executor or executors herein-after named, as shall duly take on him or them the execution of this my will, his or their heirs, executors, administrators, and assigns, as tenants in common, and not as joint tenants." And the testator afterwards appointed the plaintiff and defendant his executors, and died, and the plaintiff and defendant both proved the will. The defendant was, at the time of the testator's death, indebted to him in 3000*l.* and for securing thereof, had given a bond to the testator.(15) The

Equity prevents the extinction of a debt by a devise to the debtor, and holds the interest to pass by a bequest of the personalty; and extrinsic evidence of a contrary intention in the testator cannot be received.

(x) *Cas. Temp. Lord Talbot*, 240; and see 4 Bro. P. C. 179.

(15) In equity, a debt is not released by a creditor's making his debtor his executor; but at law it is otherwise; and if a creditor makes his

prayer of the bill *was, that the defendant might account with the plaintiff for the testator's residuary property, and pay to him a moiety of the said sum of 3000*l.* with interest, and the cross bill was brought to have the bond delivered up to be cancelled: It appeared by the answer of the defendant in the original cause, and by the proofs, (16) that the testator really designed to give this money to the defendant, and that he had actually instructed one Vinier, the attorney who drew the will, to make this disposition accordingly: that Vinier neglected to make mention of it in the will; insisting that the bond would be extinguished and released, of course, by Selwyn's being appointed executor; but that the testator appearing dissatisfied with Vinier's opinion, a case was laid before counsel, who confirmed what Vinier had said, relying upon which, the testator signed and published his will, with a full persuasion that the bond would be extinguished; and this appeared clearly to have been the intention of the testator.

It was impossible for parol evidence to be more decisive than that which was offered in this case, if it could have been received; but it is equally plain, that if the will were considered without the parol evidence, and the general devising words giving all the real and personal property, not *before disposed of, to the residuary legatees, were only attended to, that this debt was included in the bequest, as falling under the description of personal estate. The chancellor, although he declared it to be his private opinion that the debt was intended to be released to the executor, by whom it was owing, thought himself not at liberty to

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debtor and another his executors, the consequence at law is still the same; nor is this consequence varied by the fact of the debtor's administering, or not administering; the reason whereof is this, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. See this doctrine well treated in *Flowd. Comm.* 184, *Woodward v. Lord Darcey*.

(16) In courts of equity, these parol proofs are generally permitted to be read without prejudice. But at law, where the jury might, and probably would be, influenced, by the admission of such improper testimony, the production of it will not be allowed. See this distinction adverted to by Mr. Justice Powell, in *Newton v. Preston*. *Free. in Ch.* 104.

yield to the parol evidence, and to make a construction against the plain words of the will.

Although the case of *Brown v. Selwyn*, is not easily reconcilable with that of *Harris v. the Bishop of London*, yet it is not opposed to the doctrine of the admissibility of parol and extrinsic evidence, to decide the judgment already strongly inclined by the context and external evidence of the instrument.

This part of the subject may be properly concluded by a short summary of the case of *Fennereau v. Poynts*,^(y) which was to the effect following: a woman by her will gave 500*l* stock in the long annuities to A, the same to B, and 200*l* long annuities to C, and directed the interest thereof to be accumulated; and the will contained a devise of the residue of her estate and effects to her nephews; the bill was filed by the residuary legatees, praying to be paid the residue of the testatrix's estate, after the payment thereof of the several sums of 500*l*. and 200*l*. to the particular legatees. Upon the hearing, it being stated that the testatrix had only 120*l*. a-year long annuities, the question was, whether the legatees should have the respective sums given to them raised by the sale of so much stock as would be sufficient to produce them, or were entitled under the will to annuities to the amount of the said sums: which latter construction would of course divide among them the whole of the property of the testatrix rateably, leaving nothing for the residuary legatees. An inquiry into the state of the property of the testatrix, at the time of her making the will, was permitted by the court, to show that gross sums of money were meant by her, and not annuities to the amount of the sums named. The words of the devise, in the chancellor's opinion, disclosed no *ambiguities patens*, as they nearly corresponded with the technical description of the annuities, as contained in the stock receipts. But he took notice that the phrase "the sum of 500*l*." went out of the technical description of an annuity, and that the additional words "the interest thereof to accumulate," more naturally imported the growing produce of a capital sum. He seemed to think, therefore, that although the words of immediate description contained no ambiguity, but were adapted to express an annual sum, yet that other parts of the will, and the context in general, furnished ground of argument, and a species of doubt, which

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(y) 1 Bro. 472.

warranted the admission of collateral evidence to explain it; and that the statement of the fortune of the testatrix was applicable to the purpose of such explanation. Which case supplies an additional proposition in the theory of evidence, viz. that where there is neither *ambiguitas patens* or *latens*, in the particular passage in controversy, but the words are clear, and there is a proper subject for their application, yet if there is another subject to which their application is less direct, and the context of the will points to this latter construction, the door is opened to the admission of exterior evidence, to second and confirm this collective inference against the literal expression of the particular clause or sentence.

*PART III.

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The Admissibility of Extrinsic Evidence to raise a Case of Election or Satisfaction in Equity.

THERE seems indeed to be an order of cases in the Court of Chancery which has let in, perhaps with some anomaly of principle, and certainly with considerable struggle in the minds of chancellors, the application of extrinsic evidence (particularly that which arises out of documents exhibiting the state of the property of a testator) to supersede the ordinary sense of a word or phrase, without any such support from the context as has existed in the instances just above alluded to; for the sake of producing a consequence of law calculated to give general effect to what, upon the whole, seems to be the true intention of a testator. It will not be loss of time to those who wish to understand this intricate subject, to accompany the writer through the late case of *Druce v. Dennison*,^(z) determined by the present Chancellor.

(10) The points of the case are numerous, and it is not with-

(z) 6 Vez. jun. 385.

(10) It may be necessary to advertise the reader, that as this work is designed rather as a commentary upon, than a compilation of, the cases introduced in it, he will find it necessary, in a great number of instances, to read the cases themselves, as they are reported in the books;

out diligent attention that the question with which we are now concerned, can be detached from the surrounding matter. The case gives birth to this inquiry—Is parol and extrinsic evidence admissible to show, that by a disposition of his personal estate in a will, a testator, dying in the life-time of his wife (on whom a settlement had been made by him in express exclusion of her dower and thirds, and a further express provision for her had been made by his will) designed to include certain chattels belonging to his wife, and not reduced into possession in his life-time, so as to put the widow to her election, either to resign the testamentary disposition in her favour, or to consent to be bound by her husband's disposition of what, in a strict sense, was her's, as not having been made the husband's by any exercise of his right ever in his life-time ?

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Whether evidence can be admitted to show that a testator designed to include under the words, 'his personal estate' certain chattels belonging to his wife, and not reduced into possession in his life-time, so as to put her to her election.

An inquiry into the general state of the wife's property, became necessary to the decision of several other questions in the case respecting the operation of the will ; for as the property of the wife consisted of chattels of various descriptions, and as the husband had done various acts affecting or relating to this property, it became necessary, in adjusting the claims of the litigant parties, to ascertain what parts of this property had, in a legal or equitable sense, become the estate of the husband, and, as such, had come strictly within the operation of the will. It was discovered upon this inquiry, that as to certain leasehold estates of the wife, actual leases had been made by the husband, and that, therefore, there could be no dispute whether *these* passed or not under the description of personal estate in the will. The husband had also entered into *agreements* for leases of other parts of his wife's leasehold property, and the chancellor inclined to think, that these agreements would bind the wife in analogy to assignments at law ; but upon this particular point he gave no decided opinion.^(a) With respect to the question, whether the husband, by this settlement, had entitled himself in equity to be considered

(a) Vide *Steed v. Cragh*, 9 Mod. 42.

and then it is hoped, that the assistance of these endeavours will be felt, in the accuracy and clearness with which the principles of each adjudication will be understood.

* [36] as a purchaser of the unreduced parts of his wife's personal property, his lordship disposed of that point by referring to the rule—that either the settlement must be expressly made in consideration of the wife's fortune to make the husband such purchaser, or such intention must be imported, and *plausibly* imported by the contents: (11) both of which circumstances were wanting to the settlement under consideration. With respect, therefore, to those parts of the wife's chattels, which had neither been purchased or reduced, the question arising upon the husband's will was, whether, having given his wife a benefit under it, he sufficiently manifested the design of embracing, under the denomination of his "personal estate," not only what was *strictly his*, but also such parts of his wife's property, as it was competent to him in his life-time to have reduced, but which, in fact, he had not reduced into his possession, so as to defeat her title by survivorship, and to put her to her election, either to renounce the benefit given to her by the will, by insisting on her rights in opposition to it, or to acquiesce in the intended disposition thereby of her legal right, in order to entitle herself to the bounty thereby expressly given to her. Out of this general question arose the special doubts as to the admissibility of parol and extrinsic evidence, to show what was meant by the testator to be comprised within the denomination of personal estate.

The principal extrinsic evidence was a paper (12) stated in the report to have been found, at the death of the testator, among his papers, together with his will, entitled, "A statement of my pro-

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(11) Upon this subject, the student will be well informed by reading the case of *Adams v. Cole*, Cas. Temp. Talbot, edit. Williams, 168. and the cases referred to in the note of the very learned Editor at the end of the report.

(12) This paper making no part of the will, it stands, in respect to its admissibility as evidence, in no higher estimation than verbal testimony, and is, in legal language, commonly classed under the general denomination of parol evidence, when, by that phrase is meant the extraneous proofs by which written instruments are proposed to be affected in their operation. Some distinction between the two kinds of extrinsic testimony seemed to be taken in *Eden v. Smith*, 5 Vez. Jun. 341. but in *Pole v. Lord Somers*, and *Druce v. Dennison*, such distinction, as affecting the question of admissibility, was disclaimed by the bar and the court.

perty, 26th November, 1792, when I made my will," in which paper the testator enumerated his freehold, copyhold, and leasehold estates, including those of his wife, and his bonds, mortgages, and other securities. In the last clause, he noticed a mortgage belonging to his wife before marriage, thus, "Harley-street mortgage, annual interest 30*l.* principal 600*l.*" That mortgage, together with other securities, was classed under this description, "general personal estate, applicable to the payment of debts and legacies."

This evidence was received, and the chancellor determined, that it did put the widow to her election, but as the exact grounds of that judgment are very material to the point we are considering, and deserve to be critically understood, and cannot be well understood by perusing the report, involving, as it does, so much complication of circumstances, without a patient and laborious attention, I shall endeavour to place them before the diligent reader in a distinct order.

A short time before *Druce v. Demmison* came before the present chancellor, his lordship had to consider the case of *Pole v. Lord Somers*,^(b) (concerning which, more will be said presently) a case very similar in its points; in deciding which, he seemed to feel a satisfaction in being enabled by the internal evidence of the will itself, to avoid a direct acquiescence in the decision of *Pulteney v. Lord Darlington*,^(c) in respect to the admission of the evidence proposed: in which last-mentioned case evidence extrinsic to the will had been received, to show that a testator who had a sum of money in his hands, under a trust to be laid out in lands for his own entire benefit, and who was therefore competent by the rules of a court of equity to dispose of such interest, either as land or money, had elected to pass this disposeable interest as personal estate, and in the shape of money; and in which said case of *Pulteney v. Lord Darlington*, the evidence offered^{*} and admitted⁽¹³⁾ was a statement of his property, drawn up for

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(b) 6 Vez. jun. 309.

(c) Reg. Lib. a. 1773, fo. 710. 1 Bro. C. R. 177.

(13) The case of *Pulteney v. Lord Darlington*, seems to have been decided on the doctrine laid down by Lord Chancellor Somers, in *Chichester v. Bickerstaff*, 2 Vern. 395, that while the money to be laid out

the testator by his steward, in pursuance of his directions, at a distance of some years⁽¹⁴⁾ from the making of the will, describing the property in dispute as personal property.

in lands remains money, it shall be part of the personal estate of the person who might have aliened the land ; or, as Lord Thurlow explained it, where a sum of money is in the hands of a person without any other use but for himself, it will be money, and the heir cannot claim. (Vide the cases in 2 P. Wms. 174, note by the editor.) If Lord Thurlow had rested his decision entirely on that doctrine, independently of the evidence produced to show an act of election in the testator, Lord Eldon would not, in the cases of *Pole v. Lord Somers*, and *Druce v. Dennison*, have found himself embarrassed by the authority of that case ; but the extrinsic evidence was admitted and acceded to, though the professed ground of the judgment seemed not to require it.

Of the admissibility of the declarations of a testator made before, after, or at the time of the making of the will.

(14) In the above mentioned case of *Druce v. Dennison*, Lord Eldon observed, that formerly the courts were very jealous of admitting evidence of declarations by the testator, except such as were made by him about the time of making the will ; and towards the conclusion of his decree in that case he remarked, that in receiving parol evidence, it gave him great satisfaction to find, that it was contemporary with the will. In *Nourse v. Finch*, 1 Vez. jun. 359, Buller, J. expressed a stronger opinion against admitting declarations which did not take place at the time of making the will. The further we go back in tracing this disposition to reject parol evidence of declarations made before or after the will, the more emphatically we find it expressed. Thus in 1 Vez. 324, Lord Hardwicke observed, that the time of making the declarations was very material, and no regard ought to be paid to declarations made not at the time of making the will. Thus, again, in the case of the Duke of Rutland v. the Dutchess of Rutland, 2 P. Wms. 215, it was said by Lord Maclesfield, that allowing parol evidence was exceedingly dangerous, and not to be done in the case of discourses made at a different time from that of making the will. And again, by Tracy, J.* it was said, that no regard ought to be paid to expressions before or after the making of the will, which possibly might be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements. But to close this view of opinions upon the subject, the reader must be cautioned against understanding the positions of the present Chancellor, in 7 Vez. jun. page 518, with too much latitude ; what he there observes as to the general admissibility of parol declarations, is applicable and was applied only to the question, whether an executor being also a legatee in a will is a trustee for the next of kin, or beneficially entitled himself to the residue

* 2 Vern. 625.

*In *Pole v. Lord Somers*, the Chancellor was glad to find a sufficient ground in the contents of the will itself to rest this judgment upon, without the necessity of positively recognising or disclaiming the doctrine as to the evidence imposed on him by *Pulteney v. Lord Darlington*. But the pressure of that case, so studiously avoided by him in *Pole v. Lord Somers*, recurred in the subsequent case of *Druce v. Dennison*. The paper exhibited in the last mentioned case, and which has been above stated, was similar to that which occurred in the case of *Pulteney v. Lord Darlington*, except that it was more pregnant with testimony of intention, as having been found in the same box with his will, and containing an express reference to it : whereas, the paper in *Pulteney v. Darlington*, was long anterior to the will, and did not seem to be prepared with any immediate view to it, neither was it a statement made by the testator himself. The simple question as to the propriety of admitting parol evidence for the purpose for which it was offered, seemed to his lordship so ripe and

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as undisposed of ; which is a question of rebutting an equitable presumption, as will be explained in another place. His lordship then lays down the affirmative with respect to the general admissibility of parol declarations to repel this presumption of equity in favour of the next of kin, with the following important distinctions, viz. that in the degrees of such evidence, contemporary declarations are clearly of the greatest weight—next to such contemporary declarations, when it is the case of a will, those which are made *after* the making of the will, are the most efficacious, for, a declaration *after* the will as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered ; but he *knows* what he *has* done, and is much more likely to speak correctly as to that than as to what he *proposes* to do. But with these, and perhaps, other distinctions, such parol declarations by a testator are all alike admissible—they are to be decided upon by their weight—but by their nature they are all admissible.* The caution, however, with which all declarations by a testator should be admitted, is well pointed out in the same judgment in *Trimmer v. Bayne*, viz. that these declarations may be made with a view to delude, as being a necessary artifice to keep the peace of families. In *Trimmer v. Bayne*, it was one of the grounds of the judgment, that the declarations there stated to have been made, and offered as evidence, had an evident purpose of deceiving and baffling the curiosity of the party inquiring.

* Vide *Trimmer v. Bayne*, 7 Vez. jun. 519.

urgent for decision, that although there appeared, in his opinion, to be much in the will itself, which, if fairly and critically reasoned, might of itself go far towards establishing the construction he was prepared to give to it, and the rejection of the paper as testimony did not involve the extinction of its operation, since there was good ground for thinking that it might be proved as a testamentary paper in the commons : yet, he chose to ground his opinion as to the admissibility of the paper in question, upon the authority of the decision in *Pulteney v. Lord Darlington* ; which being a case in which the will itself presented no ambiguity, and in which there was property to an immense amount to answer the words of the will, afforded an unmixed precedent for the reception of this collateral testimony in manifestation of a testator's intention, as to the import and extent of a particular *descriptive phrase, in a case where the application of the description to the property in question would affect the quality of the estate, and determine the rights and obligations of parties claiming under the testator. We have to thank his lordship for the breadth of this decision, and the certainty it will impart to this delicate question : for although there certainly are some visible differences between the cases of *Pulteney v. Lord Darlington*, and *Druce v. Dennison*, yet the steady administration of justice requires, that the minuteness of subdivision should terminate within tangible limits, and before it ceases to be readily intelligible and applicable.

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To the student, however, it may afford an useful exercise to proceed somewhat further in the consideration of these distinctions. In which investigation he will not fail to observe, that the subject of the devise in *Pulteney v. Lord Darlington*, was already the testator's property, and that the point of inquiry in the case was only as to the view the testator himself took of it. He will also observe, that the words of the will were applicable to it in their strict sense ; that it was in law personal estate, and the testator's own, to every beneficial intent ; but having been once impressed in equity with the character of land, by virtue of the trusts to which it had been made subject, the question was, whether the testator designed to treat it as land or money by his will, it being clearly competent to him to make it in equitable consideration either the one or the other.

The Chancellor seemed to think, that no act of election was necessary to make it personal estate, the sum being already at home, and the particular purpose no longer requiring it to be laid out in land ; but that if it were to wait for an act of election, such act of election was an ambiguity in fact, which arose upon looking beyond the will into the state and arrangements of the property, and that collateral evidence was proper to resolve that sort of ambiguity.

*In *Druce v. Dennison*, the question was not how the testator had elected to treat a property already his, in order to determine whether the subject passed under a description verbally competent to embrace it as such, but whether a property, *not strictly* the testator's, was to be embraced by words *not strictly* applicable to it, so as to affect the original title, and not, as in *Pulteney v. Lord Darlington*, a title derived under it. *Druce v. Dennison*, and *Pulteney v. Lord Darlington*, were both cases of construction purely ; but the evidence in the latter case, through the medium of imputed intention, went to give to the words used an application agreeable to their real import ; whereas, by the evidence offered in *Druce v. Dennison*, it was proposed to stretch the application of the words, by inference from intention, to a subject of which they were not properly descriptive, in order to *raise* a case of election, as against the person who claimed by title in opposition to such construction. The evidence, therefore, in *Druce v. Dennison*, went, not merely to ascertain the *quality* of the subject, in order to decide to what description of claimants or representatives it properly belonged, but to set up a meaning beyond the *literal* expression. It is therefore a case of great importance and strength—it was the reluctant decision of a cautious mind, pronounced after long deliberation, and suggested by a solemn impression of the benefit of uniformity and certainty in the administration of public justice. Though there was much in the context of the will itself, by the help of which, the chancellor might have supported his decree, yet he chose, for the sake of legal repose, to rest his decision exclusively on the doctrine, that evidence dehors the will might be received to explain the intention of the testator, so as to raise a case of election, and to link the authority of his respected name to that of Lord Thurlow, of C. J. De Grey, of Baron Eyre, and of Lord Alvanley.

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Pole v. Lord Somers, was before *Druce v. Dennison*, but I have chosen to treat of it out of the order of time, because I consider that if it had occurred *after* the case of *Druce v. Dennison*, though it would not have received a different decision, it would have stood upon a wider basis, since it would have been established upon the *external* evidence which was offered, as well as upon the *internal* testimony furnished by the context of the will; and that although, as will be shown, the case was somewhat stronger in its circumstances than either *Pulteney v. Lord Darlington*, or *Druce v. Dennison*, yet the chancellor seemed clearly, in pronouncing his judgment in *Druce v. Dennison*, to regard the case of *Pole v. Lord Somers*, as included in the principle on which he decided in favour of the admissibility of the collateral evidence in *Druce v. Dennison*. In *Druce v. Dennison*, the testator might, whenever he pleased, have acquired the ownership of that property of his wife, which his will was construed to affect; but in *Pole v. Lord Somers*, the property was not placed within his reach, being bound by his marriage settlement in favour of his children. The inquisitive student will find the last mentioned case interesting, both as compleating this head of equitable doctrine, in respect to the admissibility of parol evidence, in order to raise a case of election, and as conducting him by an easy transition from the question as it arises upon cases of election, to the consideration of it under the important head of *satisfaction*, of which it affords a very good illustration. By the settlement in *Pole v. Lord Somers*, the fortune of the wife, which consisted of monies in several funds, was agreed to be laid out in the purchase of lands, to be settled upon the husband and wife, in succession, for their lives, with remainder to and among their children, as tenants in common. Part of this property was accordingly laid out, after the marriage, in the purchase of the manor of C——; other part was invested in the 4 per cents, in the names of the trustees, and the remainder was received by R. P. the husband, and mixed by him with his own money. R. P. afterwards, by his will, made provision for his children, by appropriating certain sums of money to each of them above the amount of what they would have been respectively entitled to under the settlement, and directed their maintenance and education, during their minorities, to be taken out of the *whole* produce of his real and personal estate. He then empowered his

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executors to sell, if they should think proper, his chambers in the Temple, (which he had given to his eldest son in a former part of his will) and also, if necessary, the manor of C. and to apply the produce during his eldest son's minority, to any use for his benefit; and he empowered them also, to lay out any part of the respective fortunes of his younger sons for their use and benefit; and all the residue of his estate and effects, both real and personal, after payment of his debts and legacies, he bequeathed to his eldest son. Among the papers of the testator was found a schedule or estimate of the state of his personal property, carried down to a period long posterior to the date of his will; and it was insisted, on behalf of the eldest son, that, as the manor of C. purchased with part of the trust-property, was specifically given to him, and as the amount of the pecuniary legacies could not be answered out of the assets, without the application of the trust-funds, and was *calculated upon* the property in the schedule, which appeared to comprise the testator's wife's fortune, as well that part of it which had been received by him, and mixed with his own property, as that which had been invested in the 4 per cents, the testator must be regarded as meaning to dispose of his wife's property as well as his own. Now the rule being this, that he who claims a benefit *under* a will can claim no benefit in *opposition* to it, but is put to his election either to renounce what the will gives to him, or to take it upon the terms of acquiescing in all the other dispositions of the will, even where they affect his own claims or rights, it was very clear, that as to the manor of C. there being an express disposition, it was not competent to any of the younger children as legatees to dispute the exclusive title of the eldest son to that portion of the settled property, consistently with their acceptance of the provisions made for themselves by the same will. So far, therefore, it was a clear case of election, not raised upon the construction of words or parol evidence, but upon the unambiguous declarations of the testator. And it being also a rule of equity, that where there is nothing to raise a contrary presumption, a legacy given by a debtor to his creditor, if equal to or greater than the debt, shall be presumed to be given in satisfaction thereof; inasmuch as the testator in this case had made himself a debtor to his children, by receiving a part of the settled money, and mixing it with his own, he was considered as paying that

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will afford us some useful lights. That case was recognised
 *and approved of as the point of its adjudication, by the pre-

tion ; for as a satisfaction, it is very clear it could have only bound those*
 by whom the benefit was felt.†

In cases of this class, wherein the intention is not manifested in expression, yet if no contrary grounds of inference exist, the thing intended or engaged to be done being in effect performed, the presumption against double portions or provisions prevails‡. It seems, indeed, that if the effect of the thing be partly performed, such partial performance fulfils the obligation *pro tanto* in equity: thus where a sum of 30,000*l.* was covenanted by a man on his marriage to be laid out in land to be settled on himself for life, with remainder to his first and other sons in tail, and the covenantor died, having laid out only a small part of that sum on the purchase of some land, which he left to descend to his eldest son, Lord Talbot decreed it a performance *pro tanto*.§ So also the rule seems to be, that where a man covenants to do an act, and he does that which may *pro tanto* be converted into a performance of his covenant, he shall be presumed in equity to have done it with that intention. Thus where one covenanted by his marriage settlement with the trustees to pay to them two several sums, amounting to 2000*l.* to be laid out in land, to be settled to the uses of the marriage, and did not pay the same, but after having purchased an estate for 2150*l.* died intestate, without having made any settlement of such estate, though it was strongly contended, that as the husband had covenanted to pay the money to the trustees, he could scarcely mean a performance when he purchased land himself, yet his honour declared, after admitting that if the case had been *res integra*, he should have thought the reasoning made use of entitled to great consideration, that the case was within the principle of *Lechmere v. the Earl of Carlisle*.¶

But it seems a settled rule, that to constitute a performance, the eventual benefit must correspond in time with the period at which the stipulated benefit was to take place: thus where a testator, being under a bond to leave 300*l.* to be paid in one month after his death, bequeath-

* The reporter, indeed, adds a query, whether, if the eldest son had died, as he might have done, before the next term, so as that he could not have suffered a recovery, the second son ought then to have been barred of his chance under the settlement.

† Vide *Wilson v. Pigott*, 2 Vez. jun. 355.

‡ Vide *Weyland v. Weyland*, 2 Atk. 632. *Prince v. Stebbing*, 2 Vez. jun. 409.

§ *Lechmere v. the Earl of Carlisle*, 3 P. Wms. 227.

¶ *Snowdon v. Snowdon*, 3 P. Wms. 227, in Notis.

sent Chancellor in *Pole v. Lord Somers*, and relied on by *him as an authority, as to one of the branches of his decree in the last mentioned cases. For the object with which we tare at pre-

† [49]

ed a legacy of 500*l.* to be paid in six months, this was held to be no performance.*

The true reason of the difficulty which has been so often confessed, of separating cases of performance from cases of satisfaction, seems to have arisen from the want of annexing a just idea to the word satisfaction, which is, in truth, a term of loose and general signification, according to the use which has been always made of it in courts of equity, and has been adopted popularly to express the final and substantial effect, as well of cases of performance as of cases of election and cases of ademption or revocation, which are the terms truly expressive of the means and operations of law, by which that result described by the word satisfaction is produced. I hazard the opinion with great timidity and respect, but I cannot help suspecting that it will be difficult, if not impossible, to suggest an example of a pure case of satisfaction, if we treat the term as having an exclusive and appropriate sense, and not rather as generically comprehending certain specific varieties of equitable rules and technical consequences.

Every case upon a will made by a person under a binding contract, unless it be considered as an actual performance, can only amount to a case of election; for how can a testator by his will forcibly substitute another thing in the place of *that* thing which he was bound by his contract to do, or how can such a substitutionary disposition have any other operation than by giving a better thing in lieu of the thing contracted for, to engage and insure the choice of the devisee or legatee on highly presumable grounds of preference? If such a case is termed a case of *satisfaction*, it is because such is the final consequence of an *election*, for it may be presumed almost as certain, that where a better is proposed in the place of an inferior benefit, the condition will be accepted. In strictness, therefore, this is a pure case of election, or of satisfaction working by election.

Payment is performance. Thus where a legacy is bequeathed to a creditor, equal to or exceeding the amount of the debt, the debt is considered as meant to be answered by or included in the gift. This is therefore a satisfaction by performance, with this peculiarity distinguishing it from those other cases of performance treated of at the beginning of this note, that there can be no performance *pro tanto* by a legacy of a smaller sum, whereas, according to the case of *Lechmere v.*

* *Haynes v. Mico*, 1 Bro. 129, and see *Richardson v. Elphinstone*, 2 Vez. jun. 464.

* [50]

sent concerned, the case of *Hinchcliffe v. Hinchcliffe*,¹ may be shortly stated thus : " In a settlement made in *contemplation of marriage, the sum of 6000*l.* standing secured upon bonds, be-

Lord Carlisle, above cited, a covenant to make a certain provision may be partially satisfied by an inceptive performance.

Where a man having granted a benefit or provision by a voluntary and revocable instrument, by a subsequent instrument makes an advancement of some other bounty, or gratuity, by way of provision, to the same object,* and the circumstances of the case warrant the inference that the second provision was meant to take place of the first, is this properly a case of satisfaction ? A satisfaction it *ultimately* may be, but the true operation of it is to revoke or adeem the legacy. Neither is the term satisfaction expressive, in any other sense than as a discharge, of its ultimate effect in equity, since a smaller sum given in the life-time may, under circumstances, annul a greater provision by will†

But if a legacy of a larger sum can be wholly set aside by the substitution of a less, this cannot be called a performance, still less a satisfaction *by* performance, and still less a satisfaction *by* election ; but there seems to be no impropriety or confusion of terms in calling it a *satisfaction* (meaning only thereby a discharge) *by* revocation or ademption. And this phrase is the more appropriate, because it is certainly not in strictness of legal language an ademption or revocation *simply* : it is a satisfaction working *by* way of revocation ; for in truth, it operates as a revocation on a principle of equitable presumption.‡

It does not redound much to the accuracy of a science to multiply terms, and apply different rules to them, without first distinguishing between the different ideas to be implied by those terms : and, therefore, until the word " satisfaction " has a more appropriate and exclusive sense, it will only perplex the subject, to talk of cases of satisfaction as distinguished from cases of performance and cases of election. The idea which is meant to be conveyed by *satisfaction*, simply used, is, neither descriptive of cases of performance, cases of election, nor cases of revocation. It is not descriptive of performance, because it is not used to signify the identical, or substantial, or virtual effectuation of the thing contracted to be done, but the substitution of one thing for another. And as there are only two sorts of cases, wherein this *substitution* can take place, viz. where the thing to be done is vo-

* For some useful distinctions on this subject, the reader will do well to look into the case of *Shudall v. Jekyll*, 2 Atk. 517.

† Vide *Hartop v. Whitmore*, 1 P. Wms. 680. *Shudall v. Jekyll*, 2 Atk. 517. *Rosewell v. Bennett*, 3 Atk. 77.

‡ Vide *Ellison v. Cookson*, 1 Vez. jun. 100, 7 Vez. jun. 516.

ing part of the lady's fortune, and a *house in Conduit-street, upon a renewable lease, belonging to the husband, among other property of the marrying parties, were assigned to trustees, by way of provision for the issue of the marriage, after the deaths of the parents. After the marriage, the husband, without the privity of the trustees, received the 6000*l.* due upon the bonds, and laid out the sum of 5425*l.* 17*s.* 8*d.* part thereof upon a mortgage, retaining and applying the difference, or balance, to his own use, and he also renewed the lease of the house, and afterwards assigned it, without consulting the trustees, and received the purchase money to his own use. In 1793, not long before his death, there being then two sons and three daughters by the marriage, and the wife being alive, the settler made his will, bequeathing out of his general property portions to his children to a much larger amount than their fortunes under the settlement; and a bill was filed by the younger children, praying that they might be declared to be entitled to the benefits provided for them, both by the settlement and the will. The eldest son, to whom the residue was bequeathed by the father's will, insisted in his answer upon the production of certain books kept by the testator, in which were entered regular accounts of the particulars of his property, and its progressive increase from 1778 to 1781, and from 1784 to 1793; and in which accounts he regularly set down the money due upon the mortgage, as part of his *own* income, as also the rents of the leasehold premises, till they were sold, and after the sale of them, the produce was brought into those accounts as his *own* money. The object in producing *these books of accounts, was to show that the testator did not mean the benefit under the settlement, and the bounty under the will, to be accumulative, but to identify the funds out of which the provisions made by the settlement were to come, with the general mass of his property, so that the bequests of the will might attach equally and promiscuously upon the whole, imple-

* [58]

luntary, and where it is obligatory or resting in contract, in the former of which cases, the satisfaction operates by revocation, in the other, by putting the party benefited to his election, the *final consequence only* of each operation is properly expressed by the word satisfaction, as a sort of genus to which these cases are referrible as the specific varieties.

ing an intention to substitute the testamentary disposition in the place of the settled provision. Now whether these books were admissible evidence, or not, was the important question; upon which the Master of the Rolls (the late Lord Alvanley) thought, that if the evidence went to explain or alter the will, it ought not to be admitted, and expressed his disapprobation of *Heather v. Rider*,^(e) as being too strong a case for receiving written collateral evidence of intent, in the report of which he suspected there must have been some mistake. His honour seemed to consider the case before him as properly a case of election, which he carefully distinguished from those cases wherein the testimony offered had for its object the explanation of the will; but in cases of election, which to this purpose he treated as similar to cases of satisfaction or performance, he was of opinion, such evidence was only produced to manifest the circumstances under which a testator made his will; and the case of *Pulteney v. Lord Darlington* was much relied upon, as well as that of *Jeacock v. Falconer*,^(f) wherein Lord Thurlow observed, that evidence as to the facts upon which the testator made his will ought to be admitted.

The judgment in this case of *Hinchcliffe v. Hinchcliffe*, has a diversity of bearing, and ought to be carefully discriminated from other cases, with which it has many circumstances of affinity, before we can understand how far its principles accord with the prevailing system of law in respect to this great question of evidence.

*[58]. In *Druce v. Dennison*, the present Chancellor treated, as irreconcilable with the apprehensions of his own mind on the subject, the dictum of Lord Alvanley, in *Hinchcliffe v. Hinchcliffe*, as well as those of C. J. De Grey and Baron Eyre, said to have been pronounced by them in *Pulteney v. Lord Darlington*, which seemed to import that extrinsic evidence might be admitted so as to *raise* a case of election upon the words of the testator; which dictum did not accord with the general proposition laid down by the Master of the Rolls, as the foundation of his judgment in *Hinchcliffe v. Hinchcliffe*, viz. that evidence might be admitted to show the circumstances under which a testator made his will, but not to explain a will—that is, in the sense in which the word *explain* is manifestly used by him, not to annex a mean-

(e) 1 Atk. 425.

(f) 1 Bro. C. R. 295.

ing to words beyond their proper legal acceptation. But does not the resort to facts and circumstances out of a will, for the purpose of raising a case of election, seem to be an admission of extrinsic testimony, to explain or rather alter the will? We are to observe, however, that it was with the *dictum* of the judge, and not his *adjudication* in *Hinchcliffe v. Hinchcliffe*, that the present Chancellor, in his great decision of *Druce v. Dennison*, expressed himself dissatisfied. He was of opinion, that the proper and just effect of the evidence of the account admitted in *Hinchcliffe v. Hinchcliffe*, was not to raise a case of election, but to establish and confirm the presumption of satisfaction; for the testator, before making his will, had received the value of the house in Conduit-street, and the difference between the 6000*l.* and the value of the mortgage, on which, part of that money, on having been called in by him, had again been laid out. Now the effect of this conduct was to constitute him a debtor to his children, to the extent of these provisions under the settlement; and if he was a debtor to his children, then the dispositions of his will in their favour ought, in the juster view of their operation, to be regarded, not as putting the children to their election, but as satisfying their debt. And in cases of *satisfaction*, Lord Eldon assented to the propriety of admitting parol and extrinsic testimony to prove the intention, as a ground for the construction, where it is not admitted to graft any new or more enlarged meaning upon words, or to strain them out of their genuine *and proper direction; but, by exhibiting the circumstances under which the testator made the dispositions, and to which they were meant to apply, to create an inference of law upon the whole will, perfectly agreeable to the words of the instrument. Where this extrinsic evidence (16) has been introduced to give to the words their proper subject, without violence to the grammatical sense, and in order to aid the construction of an instrument whose sense floats in ambiguity from the mere uncertainty as to the subjects to which it applies, the principle of admitting the evidence seems to meet the sentiments of the court, as expressed in *Pole v. Lord*

• [54]

(16) See a case wherein the extrinsic evidence of papers and writings was very properly rejected, as being offered in direct opposition to the will, 1 Salk. 231, edit. Evans, 6th Ed. *Bertie v. Falkland*.

Somers, and Druce v. Dennison, and upon *this* ground the case of Hinchcliffe v. Hinchcliffe was acquiesced in by the present Chancellor.

Upon a similar doctrine he appears also to have assented to the judgment in Fonnereau v. Fonnereau, (above cited) and the cases of that class, in which the state of the property of the testator was looked at in order to give the proper application to the bequeathing words, where the will proved that something was meant to be given, but the *description* of the subject only was unintelligible. But in Druce v. Dennison the court was called upon to admit the production of extrinsic testimony for a purpose beyond that for which it was produced in Hinchcliffe v. Hinchcliffe, *i. e.* not merely to show what the testator meant to comprise under the dispositions of his will, but to support the inference that he designed to embrace under the words ‘*my personal estate,*’ property not *strictly* his own, for the purpose of putting the persons interested in the settled property to their election. We have seen, however, that, notwithstanding this distinguishing circumstance in the case of Druce v. Dennison, Lord Eldon submitted to the authority of Pulteney v. Lord Darlington, *and founded his decision of the case of Druce v. Dennison upon the principle of admitting extrinsic testimony to raise a case of election. (17) But as Ch. J. De Grey, Baron Eyre, and Lord Alvanley, declared it as their opinion, that to admit evidence for such a purpose was not to admit it to explain, *i. e.* alter or contradict a will, (for such seemed to be their meaning by the word explain) the opinions of these judges, and the present chancellor, as to the abstract point, appear to agree on the *general* proposition, that extrinsic testimony ought not to be received for such an object.

(17) In the cases of Wright v. Rutter, 2 Vez. jun. 673, and Rutter v. McLean, 4 Vez. jun. 531, the husband had assigned the wife’s legacies or equitable choses in action for a *pretended* valuable consideration, with a view to make it his own property, and under this impression, though a mistaken one, disposed of all *her* property by will, making thereout some dispositions in his wife’s favour; the wife was put to her election, the intention being looked upon as not less clearly shown than if promulged in express terms.

PART IV.

Admissibility of Extrinsic Evidence to rebut Presumptions.

THE rule prevailing in courts both of law and equity, that external evidence may be received to REBUT PRESUMPTIONS, submits the operation of written instruments, more extensively than any principle hitherto noticed, to the controul of extrinsic circumstances.(g) In courts of equity, more especially, the latitude of this allowance has been productive of important consequences, and critical discussion. The genius of the common law inclines it to generality and certainty, and even its presumptions are in some cases too inflexible to be amenable to proof. But equity carries a milder port, and, as its rules are framed more for particular than general relief, allows all its presumptions to be repelled by opposite testimony, and by testimony of every kind. Thus it is a settled rule of presumption in equity, (borrowed from the civil law) that if a father gives a legacy to a child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy.(18) This presumption was encountered in *Ellison v. Cookson*.(h) by extrinsic evidence, consisting of declarations and correspondence, which were admitted under favour of the above doctrine of receiving parol evidence against presumptions; but as in the opinion of the court, the evidence when received did not with sufficient clearness demonstrate any intention of the testator opposed to the presumption, the presumption prevailed. In *Debeze v. Mann*.(i) (which, indeed, was the case of a father and putative child,(19) but the legacy being *expressed* to be for a portion it came up to the prin-

*[56]

Of the presumption against double portions.

(g) *Lamplugh v. Lamplugh*, 1 P. Wms. 112.

(h) 1 Vez. jun. 100.

(i) 2 Br. C. R. 165.

(18) Which proceeds, says Lord Thurlow, from a view which the court takes of a legacy as a portion, and which therefore carries with it those qualities, and is considered as a deliberate distribution by a parent among his children.

(19) The cases of a natural child, vide *Grave v. Lord Salisbury*, 2 Bro. C. R. 425; and of uncle and niece, vide *Shudall v. Jekyll*, 2 Atk. 516, are said to be out of the rule.

ciple upon which the presumption is founded in the case of a general legacy by a lawful parent) the presumption was repelled by parol evidence of words used in conversation, clearly importing a design to better the child beyond the extent of the advancement, and because there was no way of carrying into effect such design, but by construing the legacy to be unadeemed.

Of the presumption of the satisfaction of a debt by a legacy to an equal or greater amount.

*[57]

It is also a rule of presumption well established in courts of equity, that where a legacy is given by a debtor to his creditor, exceeding or equal to the amount of the debt, it is a satisfaction of the debt. This rule of presumption, though *established, is met by another, viz. that every bequest is *prima facie* a benevolence ; (20) on which ground the courts have of late viewed it with great jealousy, and have shown a very ready disposition to take cases out of it, wherever any thing could be collected from the will, indicative of a contrary intention in the testator. (21) But notwithstanding the strong disposition of the courts to bound the application of this rule of presumption, parol evidence has been refused by great chancellors to be admitted to take a case out of its operation. Thus in *Fowler v. Fowler*, (k) Lord Talbot, after

(k) 3 P. Wms. 353.

(20) See the remarks of Lord Chancellor Talbot, in *Fowler v. Fowler*, 3 P. Wms. 353, 5th edit. and of Lord Hardwicke, in *Richardson v. Greese*, 3 Atk. 68, who there says, that the maxim of *debitor non presumitur donare* would not hold, if it were to be reconsidered. And again, that "legacies naturally imply a bounty," and observe what was remarked by Lord King, in reversing the decree of the Master of the Rolls in *Chauncey's case*, 1 P. Wms. 410. Lord Alvanley called it a very absurd rule, 3 Vez. jun. 466.

(21) I do not undertake to enumerate all the circumstances which will take a case out of the operation of this rule of presumption. The following, however, are the most prominent : where the payment of debts is particularly mentioned in the will, 1 P. Wms. 409, *Chauncey's case*.—If the legacy is contingent, 2 Atk. 491, *Spinks v. Robins*.—Postponement of the period of the payment of the legacy, 3 Atk. 96, *Clarke v. Sewell*. 2 Atk. 300, *Nicholls v. Judson*.—Uncertainty as to duration or commencement, 2 Vez. 635, *Matthews v. Matthews*.—The subject of the debt and legacy not being *ejusdem generis*, 7 Bro. P. C. 12, *Broughton v. Errington*. 2 P. Wms. 614, *Eastwood v. Vincke*.—Where the debt is incurred after the date of the will, Salk. 508, *Cranmer's case*. 2 P. Wms. 341, *Thomas v. Bennett*. 3 P. Wms. 354, *Fowler v. Fowler*.—Where the legacy is to a servant, 3 Atk. 69, per Lord Hardwicke,

having at the same time declared his disapprobation of the maxim; and his apprehension of the danger of attempting *to alter it, observed that though, in some cases,(22) parol evidence had been allowed, in order to show that the testator designed to give the legacy exclusive of the debt, yet his opinion was against admitting such evidence, for then the witness, and not the testator, would make the will. And in *Richardson v. Greese*,(1) Lord Hardwicke, after remarking that the court had always shown itself dissatisfied with the rule, and had been fond of distinguishing cases out of it, observed, that these distinctions were not to be taken from particular circumstances debors the will, but must be found in the will itself.

* [58]

Considering this marked disapprobation of the rule of presuming a legacy to a creditor, where it exceeds or is equal to the sum owed, to be a satisfaction of the debt, and that the courts have, in general, shown a more favourable disposition towards the rule, treated of just above, of presuming against double portions; it is not very easy to account for the contrariety of decisions, with respect to the admissibility of parol evidence in these two cases in opposition to the presumption; for we have seen, that the presumption of satisfaction in the case of double provisions for a child, might be met by all sorts of circumstantial and extrinsic evidence,(23) whereas, *it appears, that great chancel-

* [59]

(1) 3 Atk. 60.

(22) This had been positively so adjudged 30 years before in *Cuthbert v. Peacock*, 2 Vern. 593.

(23) Lord Hardwicke observed, in the case of *Clark v. Sewell*, 3 Atk. 98, that he agreed that the cases of satisfaction of portions had gone further; for where both the provisions move from the father to the same persons, and for the same purposes, this court, which always leans against incumbering estates twice over, will overlook little circumstances of time, &c. In *Sparks v. Cator*, 3 Vez. jun. 530, it was said, that slight circumstances of difference, which would repel the presumption of satisfaction as between strangers, are not sufficient in the case between parent and child. And in *Hinchcliffe v. Hinchcliffe*, 3 Vez. jun. 516, portions for children by the will of a parent, it was said, should be presumed a satisfaction of a prior provision, unless clearly not so intended. This presumption is not rebutted by slight circumstances, but the court will lay hold of any little circumstance to get out of the rule, that a debt is satisfied by an equal legacy.

lors, though concurring in the common disapprobation of the rule of presumption in respect to legacies being a satisfaction of debts, have yet refused such evidence when offered to take a case out of it.

Of the distinction between presumptions and positive rules of construction.

Whether the rule is a rule merely of presumption or of settled and fixed construction, seems to be the true question upon which these decisions turn ; for, where a positive rule of construction is established by the maxims or practice of the court, the instrument to which such positive rule of construction applies, becomes incapable of any other sense or operation, so that to oppose such construction, is to contradict the instrument itself ; and this seems to have been the true reason of the decision in *Brown v. Selwyn*. If, therefore, this presumption of a legacy's being a satisfaction of a debt, could be shown to be established upon a technical and positive rule of construction, a sufficient reason would appear for the rejection by the courts of all extrinsic evidence to oppose its operation, however easily such an odious rule might give way to opposite inferences arising out of the context and apparent design of the instrument itself. In the case of double portions when the testator subsequently advances the legatee, the *presumption* is disconnected with any rule of construction, since the will is not *construed*, but, pro tanto, *revoked*, and the presumption arises entirely out of an act of the testator de hors and posterior to the will : but where a legacy is presumed a satisfaction, the will has an *operation* and *construction*, though by being made to act upon a sum already due to the legatee, the benefit, *prima facie* intended, is stifled. The case of double portions obviously falls within the well settled doctrine of *Brady v. Cubit*,^(m) that *presumptions* may be rebutted by every sort of evidence. And is it not a presumption, though operating by construction, where a legacy to a creditor, to an equal amount with the debt, is construed a satisfaction ? And if it is a presumption, is it less within the doctrine in *Brady v. Cubit*, because it operates by imposing a construction ? The answer must wait the decision of the courts.

Of double legacies, whether accumulative or substitutory.

A difference is plainly discernible, in respect to the propriety of admitting parol evidence, between the cases just adverted to, and that wherein the same thing is given to different persons by

(m) 1 Dougl. 31.

the same instrument, in which the decisions must necessarily turn *wholly* upon construction. And though the rule of construction is differently stated by very high authorities, (24) some considering the last bequest as revoking the first, others regarding both as co-operating to effect a joint-tenancy, and others again regarding them as rendering each other void for uncertainty; yet I conceive, that, which ever of these opinions be right, parol evidence is to have no share in determining the operation. But the question is opened again, if we advert to the case of two legacies to the same person by *different* instruments, in which the rule of construing the bequests accumulative, seems but slenderly constituted on *prima facie* grounds, (n) and easily repelled by *internal* evidence. But it is still a matter of inquiry, how far extrinsic evidence can be received for this purpose. In *Barclay v. Wainright*, (o) his honour referred it to the master to inquire, whether the several persons, legatees by the first codicil, to whom no legacies were given by the second, were dead or not in the service of the testator at the date of the second codicil, and such facts were received for the sake of assisting and elucidating the internal evidence, by showing that the omission of certain legatees named in the will, did not spring from any new intention of the testator, but "from the necessary accommodation of the language to the change of circumstances. The same judge, in a case of double legacies, which afterwards came before him, (p) upon the question whether the parol evidence could be admitted, observed, that "if it is an established rule, that two legacies are accumulative where they are given by different instruments, he could not raise a presumption by evidence against it, and he was inclined to think it must be taken to be a rule. (25) If it is to be

(n) *James v. Semens*, 2 H. Bl. 213. (o) 3 Vez. jun. 462.

(p) *Osborne v. Duke of Leeds*, 5 Vez. jun. 369.

(24) See the opinions on this point collected in the margin of the *English Plowden*, 541.

(25) The rule was laid down in *Ridges v. Morrison*, 1 Bro. C. R. 389, in its full latitude by Lord Chancellor Thurlow—that where a testator gives a legacy by a codicil as well as by his will, whether it be *more, less, or equal*, to the same person who is legatee in the will, it is an accumulation." The same Chancellor adds, that it is incumbent upon the executor to produce evidence to the contrary, if he contest

State of the question as to the presumption of the courts in the cases of double legacies, in the

taken as a rule of this court, it "would be a violation of it to admit evidence to raise a presumption against it."

same and
distinct in-
struments.

such accumulation." But the *species* of evidence to which his lordship afterwards adverts, is wholly internal, and arising out of the context of the instruments. The rule, as laid down in the case just alluded to, was adopted from *Hooley v. Hatton*, (see the note at the end of the case of *Ridges v. Morrison*, 1 Bro. C. R.) which case of *Hooley v. Hatton*, Lord Thurlow observed, was examined with abundant care, accompanying that observation with a remark, that it was unnecessary to repeat the cases after reading the very able opinion of Mr. J. Aston, which, he said, contained the whole doctrine of the law upon the subject. The state of the presumption, according to the varying circumstances of the case, seems to be settled by the result of the authorities upon the following criteria, viz. where the same *specific thing or corpus* (as a diamond ring, where the testator has but one) is twice given to the same person, either by the same instrument, or by different instruments, there, in the nature of the thing, it is but a repetition.—Where the same *quantity* as 100*l.* is twice given by the same instrument, the presumption *simpliciter* is against the legatee :—But where the same *quantity* is given by the same instrument, with any additional cause assigned for it, or with any material circumstance of variation accompanying the second gift, the presumption is turned against the executor in favour of the accumulation.—Where equal sums are given in two distinct writings, or a larger after a less, or a less after a larger, the latter gift is construed an accumulation. But though the presumption in a case, wherein two legacies of the same sum or quantity occur in distinct instruments, leans against the executor, yet it is only a presumption *simpliciter*, and is turned the other way where the same cause is expressly assigned in both instruments for the gift without any additional reason. (*Menochius de presumptionibus*, lib. 4. *Pres.* 128. num. 4, 13, 14, and see *Swinburne*, part 7, c. 20, fol. edit. 550.) And it seems also, that where in a distinct instrument a larger legacy is given to the same person, assigning, in *totidem verbis*, and with a perfect identity, the same cause which was expressed in the former instrument, this shall not be a double legacy. Per Lord Hardwicke, 2 Atk. 640; with which position, Aston, J. in *Hooley v. Hatton*, appears to agree, and the same doctrine seems to be held by Lord Thurlow in *Ridges v. Morrison*, above cited, and is stated to be the rule in *Menochius de presumptionibus*, lib. 4. *pres.* 128. vid. *Swinb.* 4to. edit. 201, in marg.

It is to be remarked, that in the above mentioned case of *Hooley v. Hatton*, which is a very leading authority, no idea appears to have been entertained of the admissibility of parol evidence. Mr. J. Aston opened with observing, that in the case before him, there was no *internal* evidence; therefore, he must refer to the general rule of law. And

*Whether his Lordship would have been ultimately governed by these maxims, if the decision of the case had depended upon it, cannot be known, since the case was determined upon the *internal* evidence of the will and codicil themselves. It was much contended, that it was a case of presumption, and that *all* presumptions were open to be encountered by parol evidence; and it was resembled to the case of *Brady v. Cubit*, above cited; between which, however, and the case under review, there seems to be this distinction, viz. that in *Brady v. Cubit*, the presumption was drawn from the *acts* of the testator, and it seems ob-

the Lord C. B. Smythe observed, that "the intention is the clearest rule, but it is admitted on all hands, here is no *internal* evidence; we must therefore refer to the rule of law." And lastly, by the Lord Chancellor Bathurst, it was said, that "no argument could be drawn in the case before him from *internal* evidence; they must, therefore, refer to the rule of law."

In *Ridges v. Morrison*, what Lord Thurlow's opinion was, as to the admissibility of parol evidence, does not expressly appear, but it is to be observed, that in illustrating his remark, that slight circumstances may operate in proof of the testator's intention, he specified such only as could be collected from the context of the instruments. And in *Campbell v. the Earl of Radnor*,* the decision turned upon the words of the instruments. But in *Coote v. Boyd*,† the point respecting parol evidence came directly under adjudication, in which Lord Thurlow laid down the rule thus, "the question, whether by giving two legacies, the testator did not intend the legatee to take both, is a question of presumption *donec probetur in contrarium*, and will let in *all sorts* of evidence." And the same chancellor further observed, (what the temper of later decisions seems inclined to adopt, as the true and practicable distinction) that "*where the question arises upon the construction of words simply, qua words, no evidence (i. e. extrinsic evidence) can be admitted.*"

Before I conclude this note, it may be useful to the student to apprise him, that the case of the Duke of St. Albans v. Beaucherk,‡ seems to have been in some respects defectively stated, and should not be read by him, without attending to the comments of Lord Bathurst in the above cited case of *Hookey v. Hatton*. By supplying some words not in the report, the positions of Lord Hardwicke are reduced from their generality, and confined to the circumstances of the case before him. *Quod vide.*

* 1 Bro. C. R. 271. † 2 Bro. C. R. 521. ‡ 3 Atk. 636.

* [64]

That all sorts of evidence are admissible to rebut presumptions, and even that constructive operation of an instrument, which is referrible to presumption with different degrees of force: but not where it is a question as to the construction of words, *qua* words, or as to the effect of limitations or technical expressions.

* [65]

viously reasonable, that wherever the inference arises out of extrinsic circumstances and facts, it should be subjected to the opposite evidence of the like extrinsic nature. But whether this distinction will be suffered to affect the principle of admitting extrinsic evidence, and to raise a barrier of exclusion against it, in the cases wherein *rules of presumptive construction prevail, may be considered as having been thrown into great doubt by the fluctuations in the opinions of the great seal. The complexion, however, of the later judgments of the courts emboldens me to say, that it strongly appears as if the distinction adverted to by Lord Thurlow, in *Coote v. Boyd*,^(q) was daily gaining ground, and every man who looks to the law of this land, not as a source of forensic disputation and endless controversy, but of useful reason and applicable rules, must rejoice to see its distinctions taking a greater practical breadth and consistence. The distinction alluded to is this—that *all sorts* of evidence admissible, with different degrees of weight and value, to rebut presumptions of equity,⁽²⁶⁾ and even that constructive operation of an instrument which is referrible to presumption; but that where the question arises upon the construction of words, *qua* words, no extrinsic evidence can be admitted; still less can it be received to controul a technical rule of verbal construction. So too, the rules which apply to and modify the titles to real and personal property, wherein the courts of equity hold a perfect agreement and parallelism with courts of law, as, for example, such as concern the rights of representation and administration, the quantity of estates expressed by certain legal idioms, the compass and effect of limitations, and the descriptive force of technical expressions,⁽²⁷⁾ are not *to be shaken or encountered by ex-

(q) 2 Bro. C. R. 521.

(26) It has long been fully settled, that parol evidence is admissible to rebut a resulting use, *Lord Altham v. Earl of Anglesea*, 2 Salk. 675. See also *Roe, lessee of Roach v. Popham and others*, Dougl. 25.

(27) That parol evidence cannot be admitted to contradict such legal signification and compass of words, *vide Kelly v. Paulett, Ambler* 605. The sense of words, as fixed by legal authority, is not to be altered by external proofs of contrary intention. Thus the sense and scope of the word *Relations*, where there is a devise to persons by that general name, without any words of more specific designation, have been

trinsic evidence. Thus, that rule of construction which makes void a remainder of personal *estate, limited upon a prior gift or assignment of the same to a man and the heirs of his body, and vests the

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Examples of
rules of construction not
to be opposed
by extrinsic
evidence.

adjusted to the statute of distributions in courts of equity, and adjudged to comprehend only the nearest of kin to the extent of the degrees within that statute; and parol evidence will not be let in to show that a greater or less compass was intended to be given to the word by the testator, vide *Whithorne v. Harris*, 2 Vez. 527. *Roach v. Hammond*, Prec. in Chan. 401. *Green v. Howard*, 1 Bro. C. R. 31. Nor does this construction render the will inofficious and nugatory, since the wife is excluded, not being within the meaning of the next of kin, but provided for by the statute by the name of wife. Neither is it without effect, though the persons to take under this construction be the same and only such as would take under the statute, for still their shares may be different; as if a testator directs a sum to be equally divided among his relations, it must go to them *per capita*, and not *per stirpes*, see *Thomas v. Hoole*, Cas Temp. Talbot, 251. *Phillips v. Garth*, 3 Bro. C. R. 64. *Butler v. Stratton*, 3 Bro. C. R. 367. The rule of division is the same also where the bequest is to the next of kin, and there are brothers and brother's children—so too, if a legacy be given to the descendants of A and B, equally, children and grandchildren take *per capita*. *Jones v. Beale*, 2 Vern. 381, which carried a bequest to relations to the children of a cousin-german, living the parent, cannot, as it seems, be law; nor if the parent of those children had been dead, and other cousin-germans living, ought it to have gone to the children of the deceased, for the statute does not carry the representation among collaterals beyond the children of brothers and sisters.—And I apprehend there is no good authority for giving a share of such legacy to relations, to brother's children, living the brother, vide 1 Bro. 32. But if the testator mark an intent to carry the word relations beyond the extent of the statute, the court will effectuate the disposition, the statute being only adopted from necessity. However, a legacy for a mourning ring to each of the testator's relations, by blood or marriage, was confined by the court to the nearest of kin, according to the statute of distributions, and to those who had married persons entitled under it. Vide *Davison v. Mellish*, 5 Vez. jun. 529.

That the words *poor relations* do not confine the bequest to objects of charity as well as relations, see *Widmore v. Woodroffe*, Ambler, 640. *Isaac v. Defriez*, Ambl. 595. *Car v. Bedford*, 2 Can. Ca. 146. It is otherwise, if a discretion and choice with respect to the relations who are to take the benefit, be vested in a trustee, *Edge v. Salisbury*, Ambler, 70. *Harding v. Glyn*, 1 Atk. 468. In such case the party having the power of selecting may go beyond the statute of distributions. See *Cruwys v. Colman*, 9 Vez. jun. 319.

absolute and ultimate interest in the first grantee or devisee, will not suffer itself to be opposed by parol evidence. Accordingly in *Stratton v. Payne*,^(r) where the testator devised his personal as well as real estate to A P, and the heirs of her body, with a limitation over in default of issue of A P, the limitation over was adjudged void both by the court of chancery and the lords, who concurred in rejecting parol evidence (though it was the evidence of the person who drew the will) to show an intention in the testator opposed to this construction. Again, it is a rule of construction in courts, both of law and equity, that a devise to a man and his heirs and assigns, or a bequest to one and his executors, administrators, and assigns, conveys no original interest to the representatives, but by transmission only, and that consequently the devise or legacy fails if the devisee or legatee die before the testator; and this construction, though it operates to destroy *pro tanto* the will, cannot be opposed by parol evidence of the testator's contrary intention as to the devisee, which point was decided so long ago as in the case of *Brett v. Rigden*, in Plowden's Commentaries,⁽²⁸⁾ upon the statutes 32 and 34 *H. 8, of wills which, like that of the 29 Car. 2, require a will to be in writing, and the evidence offered of the testator's declaration of his bountiful intention towards the heir of the deceased devisee was rejected, as being in derogation of those statutes of H. 8; and the same point in respect to a *legatee* under similar circumstances, may be seen in the recent case of *Maybank v. Brooks*.^(s)

How far these principles apply in vindication of the decision of *Brown v. Selwyn*, by Lord Talbot,^(t) may be considered as doubtful. It seems singular, however, that Lord Hardwicke, after saying, in *Taylor v. Taylor*,^(u) 'that parol evidence cannot be admitted against the legal operation of a will or *implied trust*,' should, in *Robinson v. Gee*,^(x) have declared himself to differ with Lord Talbot, as considering him to have gone to too great length in

(r) 3 Bro. P. C. 257. (s) 1 Bro. C. R. 84. (t) Cas. Temp. Talb. 249.
(u) 1 Atk. 386. (x) 1 Vez. 253.

(28) 345, 3d point, and see the case of *Doe dem. Turner v. Kett*, 4 T. R. 601. A devised to B, and the heirs of her body. B died in the life-time of A. A, by a codicil, confirmed his will, held that the heir of B took nothing, although it appeared that A knew of the death of B, and of the birth of her son before he made his codicil.

Brown v. Selwyn, in his refusal of parol evidence. If a debtee makes his debtor executor, the debt is released at law ; but if equity says the debt is not released, how can it give effect to this construction but through the medium of an implied trust, as the office of executor cannot be exerted against himself. Lord Talbot must, therefore, as it seems, have regarded the circumstances of *Brown v. Selwyn*, as making it the case of an implied trust, but not of a presumptive trust. And if we consider the relief in that case as grounded on the obvious justice of saving property from accidental loss by the technical extinction of the legal remedy for recovering it, rather than on any creation of title by presumption, we shall think that Lord Talbot's firm opinion in *Brown v. Selwyn*, not chargeable with opposition to the doctrine of receiving parol evidence to rebut presumptions of equity.

*PART V.

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Of the presumptive Trust in the Executor for the next of Kin of the Testator, as to the Surplus undisposed of by the Will.

THE expansion of the doctrine of admitting parol and extrinsic testimony, to rebut presumptions in equity, has subdued the rigour of the rule, that an executor, to whom a legacy is given, is deprived, in equity, by the presumption raised by that circumstance, of the benefit of his legal title ; and becomes a trustee of the surplus undisposed of by the will, for the nearest of kin to the testator : which is a presumptive construction, supplied out of the matter of the instrument itself, and resting on an implied exclusion from the whole, by a specific gift of part.

It should be observed, that this question, as to the admissibility of parol evidence, will only properly arise where the legacy to the executor is accompanied by no particular words, denoting in a special manner the intention of the testator ; for there may be cases, as *Rachfield v. Careless*, (29) wherein the language where-

When the question as to the admissibility of parol evidence to repel this presumption properly arises.

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(29) 2 P. Wms. 157, in which case a legacy of 5*l.* was given to the executor for his care in fulfilling the will. Vide *May v. Lewin*, 2 P. Wms. 158, n. 1, and the remark by the court, in *Clennell v. Lewthwaite*, 2 Vez. jun. 473 ; also *White v. Evans*, 4 Vez. jun. 21 ; and see the nu-

by the legacy is given may carry the presumption so high, as to place it upon a level with an explicit declaration, and above all parol proofs to the contrary. Mr. J. Powis, who sat for the Chancellor, in the last mentioned case, declared his general repugnance to admit parol evidence in opposition to this equity for the next of kin, and stated it to have been a *vexata questio*, on which there had been the greatest variety of opinion in all the tribunals in which it had been agitated.

It seems that in the earlier cases, the hesitation in admitting parol evidence to repel this trust for the next of kin, arose, in a great degree, from the doctrine that in courts of equity an executor was not to be considered as any thing more than a trustee. (30)

When a legacy takes away an executor's right to the surplus.

Of the distinction between admitting evidence to raise and to rebut an equity.

merous distinctions on this subject in Mr. Coxe's note to *Farrington v. Knightly*, 1 P. Wms. 549, and the cases in the note at the end of *Nisbett v. Murray*, 5 Vez. j. 158; see also *Abbott v. Abbott*, 6 Vez. j. 343, and *Urquhart v. King*, 9 Vez. j. 225, and the cases therein cited. The distinctions above referred to, conspire to the conclusion, that a legacy will not take away an executor's right to the surplus, unless such legacy is inconsistent with the supposition that he was meant to take the whole. It is to be observed, that in this case of *Ratchfield v. Careless*, evidence seems to have been admitted in favour of the next of kin, upon which Mr. Coxe remarks, that it appears to be the only case in which parol evidence has been admitted in favour of the next of kin. Nothing, indeed, is more obvious than the distinction between raising and rebutting a presumption or an equity, for the latter of which objects, parol and extrinsic evidence can never, without great violation of the principles of law, be admitted, but the equity ought first to be raised by the presumptive construction of the instrument, to which equity parol evidence may be opposed, and then I conceive it follows upon sound maxims, both of law and equity, that parol evidence may likewise be adduced in opposition to this rebutting evidence, and in support of the original presumptive equity. And this, I apprehend, has always been the rule of proceeding; so that the observation of the learned editor just alluded to, must be understood as adverting only to the inadmissibility of parol evidence, in the first instance, and for the purpose of raising the equity for the nearest of kin, against the legal title. Indeed, the parol evidence, in the case last mentioned, for the next of kin, seems to have been superfluous, since the presumption against the executor, from the particular language of the bequest to him, was so strong as to amount to a declaration by the will itself.

(30) Vide the case of the duke of Rutland v. the Dutchess of Rutland, 2 P. Wms. 212, and the observation of Powis, J. in *Ratchfield v. Careless*, 1 P. Wms. 548. That an executor and administrator having paid

But since the case of *Foster v. Mount*, (31) an executor has been uniformly regarded as entitled to the whole undisposed residue, unless there is a violent presumption to the contrary, which a legacy given to him by the testator, without any disposition of the surplus, was by that case considered as affording. There would be no end of enumerating the cases upon this subject, (32) but it may be useful to consider a little the important case of *Nourse v. Finch*, (y) which came before Mr. J. Buller, sitting for the Chancellor, in 1791. The judge made three points of the case: 1st. Whether parol evidence should be admitted at all; 2dly. If admissible at all, to what extent it could be admitted; 3dly. If all the evidence offered in the case was admissible, whether the evidence which was read was sufficient to rebut the equity of the next of kin, under the circumstances of that case. It was the decided opinion of the judge, that the evidence tended to a conclusion directly opposed to that for which it was brought forward, but he discovered a sentiment equally strong against admitting parol evidence *at all* in such cases, avowing his transitory situation in that court as his reason for declining an opposition to the series of authorities in the same court the other way. It appeared also to be the clear opinion of the judge, that even under the shade of these authorities, at most only such part of the evidence could be admitted, which referred to the time of the making of the will, and that he probably would have rejected the evidence offered on *that* ground, if, under his third view of the case, it had not been clear against the executrix; and the force of Mr. J. Buller's objections have been feelingly acknowledged by great authorities since the decision abovementioned.

*The decree of the judge was afterwards confirmed by Lord

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(y) 1 Vez. jun. 344.

all debts, legacies, and funeral expenses, was compellable to divide among the next of kin, is a position in 2 Inst. 33, which appears to have been inadvertently laid down.

(31) 1 Vern. 473, more particularly stated in 1 P. Wms. 8th edit. Cox.

(32) In *Clennell v. Lewthwaite*, 4 Vez. jun. 471, which was decided ten years ago, it was observed by the Master of the Rolls, that the cases on the question were so numerous, that it was a disgrace to the court.

Of the *general* admissibility of parol evidence to repel the presumption against the executor.

Ch. Loughborough, on the insufficiency of the evidence offered, with an oblique concession to the authorities in favour of the *general* admissibility of parol evidence to repel these presumptions; and since the case of *Clennel v. Lewthwaite* abovementioned, in which the reasoning of the judge in *Nourse v. Finch* was much under review, and ably observed upon, it seems to have been regarded as settled, that parol evidence of all kinds is admissible to rebut the resulting equity for the next of kin, arising from any circumstances in a will by implication excluding the executor from the benefit of his legal title; and it seems to be of no importance as to the mere question of admissibility, whether the matters in proof were contemporaneous with, or subsequent to the will, although there is admitted to be a great difference in the weight of the different kinds of testimony.

All the cases anterior to that last abovementioned were then set forth in the order of time in which they were decided, and profoundly commented upon by the late Lord Alvanley, who yielded to the irresistible pressure of authorities for admitting the extrinsic evidence in these cases, except where the expressions of the will carried so prevailing an import against the executor, as to amount to a declaration of the trust for the next of kin, which, according to the effect given to it, in *Rachfield v. Careless*,^(z) will shut out all access to argument from external circumstances. Finally, in *Trimmer v. Bayne*,^(a) the doctrine received its full expansion and confirmation from the present Chancellor, who declared the sum and sense of all the authorities to be, that all parol *declarations*, whether made *before*, or *at*, or *after* the making of the will, were admissible to *rebut presumptions*, though they are not all alike weighty and efficacious. Whether they consist of conversations with people who have nothing to do with the question, of declarations provoked by impertinent inquiries, *or in whatever form they arise, they are *all* evidence, though entitled to very different credit and weight, according to times and circumstances.

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Of technical and forensic maxims regulating the construction of instruments.

The equity for the nearest of kin of the testator, which has just been treated of, takes the shape of a resulting trust, and is, as has been seen, founded merely upon a presumption of intention. But there are some equities arising upon written instru-

(z) 2 P. Wms. 158.

(a) 17 Vez. jun. 518.

ments, the strict and technical nature whereof may seem to place them under a different contemplation, in respect to their liability to be controuled by parol evidence. I mean those which do not spring out of the presumable intention, or the moral and conscientious relations of parties ; in short, such as have no foundation in our general nature, or the particular necessities of our social existence, but in the exigency of an artificial system of jurisprudence, whose maxims ought to be scientifically pursued to their consequences, connected by their analogies, and kept uniform in their application. This observation holds especially with respect to the rules which govern the succession to property ; to which some equitable canons apply of a mere *positive* nature, and which, as being grounded on general principle, rather than particular presumption, may seem to claim an exemption from the accidental influence of external circumstances ; such appears to be the rule which favours the real representative, by applying the personal estate in exoneration of the land, though *expressly* charged by the testator—a rule tating strongly of the ancient policy of our ancestors, which has impressed on the law of landed property, its inveterate preferences in favour of the heir whom it was anxious to qualify with the means of sustaining the duties of the feudal relation. The abolition of the feudal tenures, and the interests of commerce, have given birth to an alacrity in taking cases out of a rule, which is considered as not agreeable to the situation of the times. Still, however, it is left standing, and though living in dishonour, is of general obligation in courts of equity.

Of the rule favouring the real representative, by applying the personal estate in exoneration of the land.

*The general rule, as was said by Lord Thurlow, in *Ancaster v. Mayer*,^(b) is clear, that the personal estate is liable in the first instance in the payment of debts.⁽³³⁾ But in exception

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(b) 1 Bro. C. R. 454.

(33) This general rule supposes that the engagements upon which the debt arose was *primarily* a *personal* contract, in which case the personal estate, as having received the benefit, becomes the proper fund out of which the payment should be drawn ; so that if money is borrowed, or a debt is in any way incurred, and a mortgage made, without bond or covenant accompanying it, for the lender's or creditor's security, the mortgage makes it no more than a specialty debt in equity, and the land comes only in aid of the personal obligation upon the

Reason of the rule and distinctions arising upon it.

*to this rule, it is agreed that the testator may, if he please, bequeath his personal estate, as against his heir or other representative, clear of debts, and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment. "Perhaps," said his lordship, "it would not have been unwise to have adopted the rule laid down in *Fereges v. Robinson*,^(c) that the testator must use express words for that purpose ; but it is impossible to abide by the opinion given in that case, consistently with the rules of other cases. The second rule," continued his lordship, "is, that where there is a declaration plain, (by which his lordship appears to mean a demonstration of intent by necessary inference) that shall stand in lieu of express words. Furthermore," said his lordship, "charging the real estate in any way is not of itself an exemption of the personal estate. The personal fund being the fund first liable,

(c) Bunb. 301.

simple contract. Furthermore, the rule supposes that it was *originally* the *personal* contract of the *testator himself*, for if an equity of redemption has descended, and then the mortgage is transferred, and the heir covenants to pay the money and dies, still as the mortgage was not *originally his*, the land, upon the second descent, must bear its own burthen, and notwithstanding the personal contract of the intermediate heir, his personal assets will, upon his decease, be only secondarily liable.

The same doctrine holds, if the equity of redemption comes by purchase instead of descent. As it was originally the debt of the new acquirer, his heir will not be entitled to be exonerated out of his personal assets ; and the order of charge will not be varied, if the purchaser covenants himself with the mortgagee, for still it was not primarily his own debt, and his personal contract was only ancillary ; nor if he covenants with his vendor to save him harmless from the mortgage, for still the purchaser of the equity of redemption is considered as having bought the estate, subject to the charge and having the burthen upon it, to which his covenant has relation as to its principal ; and indeed, he takes upon himself no more by such covenant than a court of equity would lay upon him as an imperative obligation. In the cases, however, wherein the abovementioned rule does prevail, as wherever the debt was *originally* the debt of the testator leaving real and personal assets, can the personal effects be exempted, unless by declaration plain or necessary implication contained in the will itself ? or in other words, is parol evidence admissible to arrest the rule ? I have endeavoured with the help of the cases to answer this question.

where it is to be aided by any other legal or equitable real fund, it is nevertheless first to be applied. I have always understood that the testator must *express* an intention to discharge the personal estate, although no particular form of words is necessary for that purpose." This was the opinion of Lord Thurlow, notwithstanding the words of Lord Talbot, in *Stapleton v. Colville*,^(d) whereby it appears that that Chancellor took it to be clear, that in the decision of this point, an examination into the quantum of the testator's debts, and the amount of the personal estate might be gone into as indicia of the intention.

But it seems that Lord Talbot was not for carrying the indulgence any further, since what fell from him in another part of the same case is hardly reconcilable with the extent of his former expressions. "The testator's intention," said that Chancellor, "must govern the construction of the will, and such intention must be gathered from the will itself." In *Gainsborough v. Gainsborough*,^(e) however, full latitude was given to the admission of this evidence. To so much of *the bill in that case as sought to examine witnesses touching the testator's intention, and to have evidence received of matters dehors the will, the defendant demurred, and contended that it was of dangerous consequence to admit proof by parol to vary or controul a will in writing. But the lords commissioners, on the ground that the proofs went not to make a title, but only to rebut the plaintiff's equity, who would have the personal estate applied in exoneration of the real, held that it ought to be admitted. To this, again may be opposed the authority of Lord Keeper Henley, in *Stephenson v. Heathcote*,^(f) by whom it was said that no examination could be read, but that the intent of the testator was to be collected from the grounds of the will, and from no circumstances out of it, and from general principles and rules established in these cases.

Whether parol evidence can be received in opposition to the rule.

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Where authorities are so balanced, private judgment must be cautiously exercised; it can only conjecture the probable fate of the question, when it shall come *directly* before the court, on grounds of analogy to the principles of late decisions; and we shall expect a decision *for* or *against* the admission of parol evidence, according as we are, from a consideration of those prin-

(d) Cas. temp. Talb. 201. (e) 2 Vern. 252. (f) Cited in *Ancaster v. Mayer*, 1 Bro. C. R. 454.

ciples, inclined to regard this as a mere resulting equity, or as a strict and positive maxim of equitable jurisprudence. Certainly, the rule was not founded on the probable or presumed intention of the testator, but still it is an equity opposed to the *literal sense* of the instrument, where the real estate is expressly charged, and where it is not so *expressly* charged, I suppose it to be quite clear, that no parol or extrinsic evidence can be received. to cast an incumbrance upon it, since that would, indeed, be making for the testator a parol will, concerning his real property, in direct defiance of the statute of frauds.

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It appears, therefore, that the important question, whether this equity of the real representative to be exonerated out of *the personalty, yields only to the *internal* evidence, and to arguments drawn from the context of the will, or is capable of being repelled by *parol* and *extrinsic* evidence, seems yet to be undecided. It appears to be clearer doctrine, that parol evidence may be given of an abandonment of the privilege by the heir. Thus, if an executor pays legacies, without having first cleared the land of its incumbrances, and the heir authorises it by express or implied acquiescence, as by verbal concession, or by continuing to pay the interest to the mortgage, he is said to be bound beyond retraction.

That the benefit of this rule may be abandoned; and parol evidence may be given of such abandonment.

Of the wife's equity to have a mortgage of her estate, which she joined with her husband in making, paid out of his assets.

Parol evidence of her renunciation of this equity admissible.

To this case of the heir, the Chancellor, in *Clinton v. Hooper*,(g) compared that of a wife subjecting her own estate, by joining with her husband, in giving effect to a mortgage thereof. The general rule of equity in such case is, that the wife, after the husband's death, is entitled to call upon the executors to exonerate her estate out of the personal assets, and upon the foundation of this resemblance, between her situation and that of an heir to whom the estate comes subject to the incumbrance of his immediate ancestor, it was decided in the last-mentioned case, that the wife's parol renunciation of her claim to the executor of her husband, should conclude her representative. But it should be observed, that these parol declarations, to have any direct efficacy, ought to have been made by the wife, after that, by the decease of her husband, she has become *sui juris*; since a husband and wife are disabled to contract with each other; so that no evidence can be received of any *express promise* by the

wife to her husband. The reason for the rejection, however, of proofs drawn from the time of the coverture, does not extend to *circumstantial* evidence ; therefore proof will be allowed of the application of the money, raised by the mortgage, to the wife's own use, as in paying off an incumbrance upon her own estate, or even that the money raised was actually paid by the husband to the wife, or applied by him to *her* use, so as to place it under her disposition by deed or will. In short, any evidence showing *that in truth and fact the wife received the benefit of the money raised by the mortgage of her estate, will repel her from her equity to have her estate disencumbered out of the husband's personal effects ; and though her parol declarations, while under coverture, cannot be received against her real representative, because of the nullity of contracts between man and wife, yet it should seem that even the parol declarations of married women may be produced as collateral accumulative evidence of the fact of the application of the mortgage money ; for in that respect it stands upon the footing of circumstantial evidence.

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But parol evidence is always infirm against the intrinsic testimony of the instrument itself ; if the deeds, therefore, whereby the object was carried into execution, import on the face of them a view to the husband's benefit, evidence of parol declarations, whether made by the wife before or after coverture, will hardly be received to oppose the equity of her real representative after her decease. And where the instrument is neutral, yet if the wife's debt is proved to have been the motive, then is the wife's equity, to have this exoneration, entirely gone, notwithstanding the husband may have covenanted in the mortgage deed to repay the money borrowed. Thus in *Bagot v. Oughton*,^(h) the wife's estate had been mortgaged before marriage, and the security being transferred to a new mortgagee after the marriage, the husband joined in the transfer, and covenanted to pay the money, whereby his personal assets were expressly bound : notwithstanding which covenant, it was holden, after the husband's decease, that his personal representative should not exonerate the wife's real estate ; for the debt was not *originally* the husband's, and his covenant to pay the money was regarded only as a collateral and subsidiary pledge, and not as making the debt his *own* ;

(h) 1 P. Wms. 347.

and, indeed, parol evidence may be produced to contradict any inference from such covenant.⁽ⁱ⁾

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*The analogy extends to the case of surety and principal in a bond, though in that case the rule of evidence opens to the admission of proof of conversations between the obligors, at the time of borrowing the money, as indications of a contract between the parties : which evidence, in the case of the mortgage by husband and wife of the wife's estate, we have seen, is excluded by a technical rule of disability.

PART VI.

Of the Admissibility of Extrinsic Evidence to prevent FRAUD, to correct MISTAKES, and to protect against the Consequences of Loss or ACCIDENT.

THERE are three branches of doctrine still remaining to be considered, with relation to this intricate learning, which arise principally out of the particular jurisdiction and relief of courts of equity, viz. fraud, accident, and mistake. Fraud is a subject of relief in equity, and a bar at law, to which no solemnities of authentication can be opposed, and the anxiety of our courts of judicature to prevent its success, has, where its existence is the object of proof, made extrinsic and parol evidence admissible. And, indeed, the steps by which the courts have progressively proceeded in subjecting written instruments to the controul of parol evidence, are said to have had their commencement in the cases of fraud.

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Though the statute may have increased the jealousy of parol evidence, yet it raises no barrier against its admission, where it professes and tends to support a charge of fraud. The antipathy of the law breaks through all reserves, to accomplish the overthrow of deceitful contrivances. Thus, although evidence to show that by an inadvertent phrase in a will, the testator has made a provision *contrary to his real intention, would probably be rejected; yet, if it extended to prove that the testator had been led into the error by the designing misrepresentations of persons attending his sick bed, the charge of fraud would let in

(i) *Evelyn v. Evelyn*, 2 P. Wms. 665. *Lord Kinnoul v. Money*, 1 Vez. jun. 186. Note MS. by Lord Loughborough.

the evidence proposed. On this principle, the evidence offered in the late case of *Small v. Allen*,^(k) in the court of King's Bench, was admitted, and suffered to prevail. The testator in that case having already made a will, nevertheless, at the request of some interested persons, consented to make a fresh will, and one being prepared and presented to him for execution, he desired to be informed whether that which he was called upon to execute was the same as the former, and upon being told it was, he subscribed it; but the second will appearing to be materially different from the first, it was set aside upon evidence of these circumstances of imposition upon the testator.

The fraud, however, must in these cases be the alleged ground and object of the parol evidence. In *Lord Portmore v. Morris*,^(l) the evidence went to prove that it was part of the agreement for an annuity, that it should be made redeemable, but such agreement for redemption making no part of the written contract, the Master of the Rolls observed, that "if fraud had been imputed, the evidence might have been admitted, but that it was dangerous otherwise to depart from the deeds."^(m) It might be the intention, that the annuity should be redeemable, but he could only get at it by demolishing one of the foremost rules of law. He would therefore reject the evidence." The case of *Hare v. Shearwood*,⁽ⁿ⁾ was determined on the same principle. But where fraud is alleged in the bill, and the evidence goes to establish it, the statute of frauds may very properly be put out of the way, since the object of such evidence is not properly to contradict the instrument, but to raise an equity *dehors* the instrument, *in contravention of a purpose which no law or statute will be suffered to assist or protect.

Of the necessity of charging the fraud in the bill in equity for relief in order to take the case out of the statute.

[80]

Trusts and provisions have sometimes been added to instruments to effectuate the intention of a party, where suppressions or omissions have been induced by the fraud or misrepresentations of others. As in the case of *Hutchins v. Lee*,^(o) where parol proof of a trust, not expressed in the instrument, was received; and in *Barrow v. Greenough*,^(p) where a provision of a will was increased by the court upon evidence of the testator's having declined making a new will for adding to the provision, as

Of giving effect to the intentions of a party to an instrument, against fraudulent omissions or suppressions by adding trust and provisions.

(k) 8 T. R. 147. (l) 2 Bro. C. R. 219. (m) Vide also *Lord Irnham v. Child*, 1 Bro. C. R. 92. (n) 3 Br. C. R. 168. (o) 1 Atk. 447. (p) 3 Vez. jun. 152. See also *Thynn v. Thynn*, 1 Vern. 296.

it was his intention to have done, upon being promised by his executor and residuary legatee, that his intention should be carried into effect without it; it may indeed be less correct to say, that the trust in the former case was added or supplied to the instrument by the court, than that the general relief given by the court proceeded upon the assumption that it ought to have been added, the court having inferred fraud from the omission, upon parol proof of a contrary intention in the party seeking the relief. In the last-mentioned case, the person circumvented by the fraud was helped out of the assets, which was in effect adding to the will.(34)

But although where fraud is imputed, the court seems to conceive itself bound to admit parol evidence to be read to establish it, yet it will be cautious in listening and giving effect to such evidence, particularly where it is offered offensively, and to set aside instruments. We observe, that in *Hutchins v. Lee*, above cited, wherein a bill was filed, to set aside an assignment of a leasehold estate, upon a suggestion, that the same was never intended as an absolute assignment, but was meant to be subject to a trust for the benefit of the plaintiff, there was an evidence supplied by the context and bearing of the instrument itself, contradicting the intention of an absolute assignment, so that the external evidence received great confirmation from the indications on the face of the deed.

Courts of equity more reserved in admitting parol evidence to compel a specific performance, than when offered for the purpose of resisting the application.

The authority to set aside instruments for fraud used in obtaining them, has furnished a copious head of relief in equity; (35) but the statute and the rule of law respecting the admissibility of parol evidence, come only properly into question, where an instrument is opposed, on the alleged ground of some fraudulent variation in the written terms, from the intention of the party, and where the court, by the exercise of its peculiar jurisdiction, would virtually be giving effect to a supposed contract, extrinsic and contradictory, or suppletory to the instrument itself, and sub-

(34) In *Whitton v. Russell*, 1 Atk. 448, a similar case, the relief was refused, but the Chancellor observed, that there was no clear fraud, nor did it appear, that the testator was drawn in by any false promises, not to add the legacy to his will.

(35) See the learning collected and arranged on this subject in Mr. Coxe's note to the case of *Osmond v. Fitzroy*, 3 P. Wms. 131.

stantiated only by parol testimony. On which subject the following distinction is always to be observed: where the court is applied to by bill for specific performance, to lend its extraordinary assistance to compel the execution of a contract, existing only in parol agreement, but alleged to have been prevented by fraud from being properly authenticated, or to supply fraudulent omissions, or to rectify mistakes, or to correct variations, or to expunge surreptitious additions, it testifies an uniform reluctance to break in upon the rule and the statute: but though the case must be very strong, which will engage a court of equity in a direct contest with the statute, by coercing the performance of a parol agreement; yet, if a suitor is striving to compel the performance of a written contract, equity will always refuse its discretionary and extraordinary relief, where the justice of ^{the case,} through whatever medium of evidence it is made to appear, is on the side of resistance. A defendant is therefore in a better plight in that court to take advantage of parol testimony than a plaintiff. In the case of *Joynes v. Statham*,^(g) the object of the bill was to carry an agreement into execution for a lease of a house, signed by the defendant only, upon the face of which agreement the plaintiff was to pay a rent of 9*l.*; and it was insisted by the defendant, that it ought to have been inserted in the agreement, that the tenant was to pay the rent *clear of taxes*, but that the plaintiff, having written the agreement himself, had omitted this part of the contract; and that the defendant, unless this had been the real agreement, would not have sunk the rent from 14*l.* to 9*l.*; to which effect evidence was offered to be read, and admitted by the Chancellor, who introduced his observations with declaring, that it was the constant doctrine of that court to consider it as a matter within its discretion, whether, on such a bill, it would decree a specific performance, or leave the plaintiff to his remedy at law. He put the case of a mortgagee bringing a bill to foreclose, where no proviso for redemption was inserted, and the mortgagor was a markaman; and of a mortgage by an absolute conveyance and defeasance, where the defeasance was omitted to be executed by the mortgagee; in both which cases, evidence of the omission by mistake should doubtless be received.

The case of *Legal v. Miller*,^(r) is also illustrative of the same doctrine: an agreement in writing had there been entered into, to

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(g) 3 Atk. 387.

(r) 2 Vez. 299.

take a house of the defendant at a rent of 32*l.* the landlord undertaking for repairs ; but the house having been found too ruinous for repair, the landlord, with the consent of the tenant, pulled it down, and rebuilt it, without any alteration having been made in the written agreement ; but the engagement by parol was, that the tenant should add 8*l.* to the rent of 32*l.* in consideration of the great additional expense sustained by the landlord.

* [83] A bill having been filed *by the tenant to compel a specific performance, on the foot of the written agreement, the parol agreement was set up by the answer, and proved, and the bill was dismissed with costs, and with pointed censure from the court.

The case of *Walker v. Walker*,^(s) and others, might be produced, to show that a court of equity, notwithstanding the statute of frauds, will hear parol evidence of the merits and justice of the case, and listen to facts and declarations dehors the deed, before it will stir itself in its extraordinary functions to assist a plaintiff, by compelling the specific performance of a contract : and it seems very right and reasonable, that the whole equity of a transaction should be laid open to examination in every way, and by every shape of evidence, where a party, not content with a compensation in damages, brings his adversary into a court of conscience, for compelling the exact execution of his contract. The language of the court in such cases is—if you want equity to be done, you must show yourself to have done, or to be ready to do all that equity requires of you.

The cases just above commented upon, show the latitude the courts of equity allow to parol evidence, where it is offered on the part of the defendant, to resist an application for a specific performance, especially where it discloses a ground of fraud. That of *Woollam v. Hearn*,^(t) decided by the present Master of the Rolls,^(u) illustrates the negative side of the distinction. In this case, Hearn being possessed of a house, under an agreement for a lease for 7, 14, or 21 years, agreed to let the same to Penelope Woollam for 17 years, and a memorandum was signed by both, stating an agreement for a lease from the defendant to the plaintiff for 17 years, at the yearly rent of 73*l.* 10*s.* ; the bill was

(s) 2 Atk. 98, and see the *Marquis Townsend v. Stangroom*, 6 Vez. jun. 328. (t) 7 Vez. jun. 211. (u) Sir William Grant.

filed by Woollam, stating that the rent of 73*l.* 10*s.* was inserted in the agreement *by mistake, or with an unfair view, the real agreement being that the plaintiff was to have the lease at the same rent as the landlord paid for the premises to his lessor, and that he did not pay more than 60*l.*; and the prayer of the bill was for a specific performance, by the execution of a lease by the defendant, according to the alleged agreement, at the rent of 60*l.* or such other rent as the defendant paid his lessor. The mistake and fraud was denied by the answer, but the parol evidence which was admitted *without prejudice*, supported the allegation of the plaintiff. Sir W. Grant dismissed the bill, it being admitted at the bar that there was no authority in direct support of it; but his Honour at the same time observed, that if the party who was defendant in this cause, had brought his bill for a specific performance of the agreement in writing, he should have felt himself bound by the decisions to have admitted the parol evidence against him, and to have given it effect; but as the evidence was offered, not for the purpose of resisting, but of obtaining a decree; first, to falsify a written agreement, and then to substitute in its place a parol agreement, to be executed by the court; and as it appeared to him, that the statute had been too much broken in upon by supposed equitable exceptions, he should not go further in receiving and giving effect to parol evidence, than he was forced by precedent.

* [84]

In respect, therefore, to the compulsory performance of executory contracts, the doctrine of the courts of equity appears to be, that, upon an allegation of fraudulent variance in the written agreement from the terms truly agreed upon by the parties, or of a collateral verbal agreement controuling or altering the effect of the instrument, they will refuse their extraordinary relief to the plaintiff by compelling a specific performance of the agreement according to such verbal evidence of intention, unless actual fraud is also proved; but if the party relying upon such parol testimony, lays it before the court in the character of a defendant resisting an attempt to carry into effect a written agreement, fraudulently obtained, or varying through mistake or circumvention from the professed intention of the parties, *the ear of the court will be open to every description of extrinsic evidence, and its active interference will be granted or denied according to the weight and value of such evidence.

* [85]

Where loss or destruction can be proved, the contents of an instrument may be shown by parol evidence.

The doctrine is simple on the head of loss or accident. The whole contents of a deed may be verbally proved in all courts, where it is made satisfactorily to appear, that it has been lost or destroyed; and the fact of such loss or destruction, from the nature of the thing, can only, and is therefore required only to be made out upon grounds of strong inference and probability,^(x) for the best evidence which the nature of the case admits ought to be received. Nor is the statute at all invaded by the admission of such evidence in a case within its provisions, since the evidence does not go to establish a verbal agreement, or to put a case out of the reach of the statute; but supposes the case to fall within it, and strives to demonstrate a compliance with its requisitions, by showing that an instrument did once exist with all the circumstances constitutive of its legal validity. It is also to be observed, that cases of this sort are favourably regarded by the courts, and though proof is required of the contents of the instrument, yet if destruction is proved by substantial testimony, the evidence of the contents will be helped by presumption against the spoliator.

It is moreover a well-grounded reason for admitting parol evidence of the contents, that the instrument itself is in the hands of the adversary who refuses, upon proper notice,^(y) to produce it.

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*PART VII.

Some Miscellaneous Topics.—Mercantile Contracts, &c.

Of the doctrine in respect to commercial contracts.

WITH respect to mercantile contracts and adventures, it has been said, that as the articles are commonly extremely short, where a doubt arises about them, the usage and understanding of

(x) Vide *Saltern v. Melhuish*, Ambler, 247. *Whitfield v. Fausset*, 1 Vez. 387.

(y) And see the Ni. Pr. case of *Leeds v. Cook et Ux.* 4 Esp. 256, where a letter had been written by the plaintiff to a witness, and the witness having had a *subpoena duces tecum* from the defendant, had delivered the letter over to the plaintiff, who refused to produce it, having had no notice: Lord Ellenborough held, that as it was subtracted in fraud of the subpoena, parol evidence of its contents, although notice had not been given to produce it, should be admitted *in odium spoliatoris*.

merchants may be consulted thereupon.(z) An observation which ought to be understood with a proper restriction, for there cannot be a different rule of evidence in respect to commercial instruments, from that which prevails in other cases. The shortness, and often the perplexed language of these instruments, may leave them more open to explanation than others, and the usages of merchants may be resorted to as a medium of explanation; but witnesses, whatever may be their experience, ought not, I presume, to be allowed to put their own private construction upon the contract, even for the purpose of explaining it; much less, as it should clearly seem, can such instruments, however loose, and whatever may be the practice among merchants, be altered, contradicted, or added to by parol and extrinsic evidence.(36) But *as all instruments may be explained

* [87]

(z) By Lord Hardwicke in *Blunt v. Cumyns*, 2 Vez. 331.

(36) In *Kaines v. Knightly*, Skin. 454, see this point so determined in respect to a policy of assurance. See also *Henkle v. the Royal Exchange Assurance Company*, 1 Vez. 217. In the case of *Motteaux v. the Governor and Company of the London Assurance*, 1 Atk. 545, the policy was permitted to be set right by a label which had been entered into a book, and subscribed by both parties, containing the instructions and all the particulars of the agreement. But in the *nisi prius* case of *Bates v. Grabham*, 2 Salk. 444, determined by Lord Holt, there was no such natural ground for the admission of the extrinsic evidence; for though it went to prove an alteration of the terms by consent, yet still, if such consent is verbal, and only to be got at through the medium of parol evidence, is not its admission equally opposed by the principle of law? and though it may be true that a policy of assurance is an instrument founded upon broad equitable principles, as Lord Mansfield has expressed himself; yet, unless equity allows a written instrument to be varied by verbal evidence, where the law will not, I do not see how these equitable principles can enlarge the doctrine of evidence, by their application to these instruments.

persons experienced in the subjects to which they relate, and acquainted with the ideas they are designed to convey.

Transactions in *pais* regarding real property, proveable by parol testimony.

In some certain cases, although the transaction relates to lands or hereditaments, the written authentication of it may be corrected or supplied by parol evidence. Of this kind are surrenders of copyholds, which being in themselves mere matters of fact, though recorded for the better preservation of their memory, averments of mistakes in the entries of them, as well to the lands as the uses, have been admitted in courts of law.^(a) Upon a similar principle also, where⁽³⁷⁾ a clerk had been presented to a church and instituted, but a blank was left in the bishop's register for the name of the patron, the omission was allowed to be supplied by parol evidence, for as the presentation might be made by parol, the effect of receiving the verbal testimony was not to make that **pass* by parol, which the law requires to be conveyed by writing. And though it be true, that if a matter not necessary to be in writing, is nevertheless, for greater solemnity or assurance, committed to paper, the intent of the parties must be collected only from the *written* contract or instrument, yet we can easily discern the distinction between the effect of a writing, which gives birth to and comprises the very essence of the transaction, and that which after the transaction has had its legal operation, records and preserves the memory of the fact.

* [88]

Parol testimony, however improper on other occasions, is good when it comes from the adversary.

Some particular cases there are in which, upon the broad principles of the evidence, a matter, which ought otherwise to be proved in writing, may be substantiated by parol testimony; as, where such testimony comes from the mouth of a party's own witness examined by himself, and makes for his adversary, his adversary shall have the advantage of it. Thus, in *Blunt v. Cumyns*, it was held by Lord Chancellor Hardwicke, that the parol evidence examined by the plaintiffs, as to the articles in question in that cause, and not called for, might be called for by

(a) *Towers v. Moor*, 2 Vern. 98.

(37) 1 Wils. 215. What is said by Lord Kenyon on this case in *Rex v. the inhabitants of Eriswell*, T. R. 723, does not affect the proposition, that parol evidence is admissible in such a case, but denies that common reputation could be received as evidence.

the defendants.(b) And his lordship further observed, that at law, where a witness called on one side, proved a matter by parol which was in writing, and proper to be proved in writing, and it tended to the advantage of the adverse party, it was held, that being a witness called, and examined by themselves, it should be admitted *as evidence ; though it would not, if it had been called on the other side ; of which he said there was a case in the time of Holt, C. J.

* [89]

Parol evidence has been also allowed to vary the terms of an instrument in writing, in the cases wherein a matter unintentionally introduced, has brought a transaction within the letter and penalties of the statutes of usury. Though an agreement in writing ought not to be contradicted by parol evidence, according to the general rule, yet such rule would be carried to an unjust degree of severity, if it were suffered to preclude a man from avoiding the consequences of a penal law, by resorting to any evidence whereby his innocence might be proved. Thus, where upon a loan of 50*l.* a bond had been given in the penalty of 100*l.* conditioned for the payment of 58*l.* at the end of six months, and on an action upon the bond, the defendant pleaded the statute of usury, and the plaintiff replied, that he lent the 50*l.* for a-year, and that it was agreed that the plaintiff should pay 8*l.* for the year's forbearance, which was then the allowed rate of interest, and that by the scrivener's mistake it had been made payable at the half-year's end ; this allegation, though opposed to the words of the condition, was held good.(c)

Parol evidence allowed to avoid the consequences of usury.

(b) 2 Vez. 331. I have given my readers credit for not confounding parol with *via voce* evidence. Extrinsic evidence is certainly the correcter expression. I have more frequently used the term "parol," because it is oftener found in the books. Indeed, in equity cases, it cannot well have any other signification than evidence extrinsic to the instruments themselves, from whatever sources it may be collected, since in courts of equity all the evidence is written. Nor is this inconsistent with the ancient use of the word "parol" in our law, which, as has before been said, was applicable to any instruments not sealed and delivered. It is not, however, meant to be denied, that in its larger sense the phrase "parol evidence," signifies that evidence, which is *spoken* in contradistinction to that which is *written*.

(c) Cro. Car. 501, *Nevison v. Whitley* ; and see the same point, 12 Vent. 83, *Bush v. Buckingham*.

A written agreement may be discharged by parol evidence.

* [90]

By the operation of the statute, wills are not revocable, unless by writing ; and deeds, by reason of the solemnity of their authentication, are set above the controul of any other acts not of equal dignity and force in the law ; but it has long been considered as settled that agreements, though they cannot be altered or contradicted, may nevertheless be *discharged* by parol. This was so held by Sir Francis North, Lord Keeper, in *Goman v. Salisbury*,^(d) where it was the single point of the case. In *Pitcairn v. Ogbourne*,^(e) that decision was adverted to, and the propriety of it admitted by Sir John Strange ; and again, by the present Chancellor in the late case of *Coles v. Trecothick*,^(f) the doctrine *was distinctly recognised and affirmed. But it should clearly seem, from the analogy of the decisions, that, to effect this discharge of an agreement by parol, a distinct independent verbal agreement must be proved. Nor does it appear, that a *partial discharge* can be effected in this way. Such evidence, to show that annuity was meant to be made redeemable, has been refused.^(g) But where a contract has been so discharged, yet if the abandonment of the contract be made the ground of an action, it has been held that it is not competent to the plaintiff to show, that a contract has existed and been abandoned, without proving the specific contract ; and if that contract was not in writing and signed, the statute is in the way.^(h)

Thus far the attempt has been made, under circumstances greatly discouraging, to render some assistance to the student in his progress through this thorny path of legal learning : from which attempt, it is humbly hoped, that the doctrine of ambiguities, latent and patent, has received some elucidation ; and that in general, the points respecting the admissibility of parol and extrinsic evidence, have been left in a clearer state than they were found by the writer. Though he has not been able to rear an edifice of consistency and science, it is, perhaps, not too much to say, that he has raised the materials from the quarry, and disposed them in an order more ready to the hand of a better architect. His own purpose has been considerably served by this

(d) 1 Vern. 240. (e) 2 Vez. 375. (f) 9 Vez. jun. 250. (g) By Lord Kenyon in *Rosamond v. Lord Melsington*. (h) 1 Bos. and Pull, 306, *Walker v. Constable*.

general introductory view. He will have much less trouble hereafter when he comes to discuss the particular branches of the statute, whereby writing and signing are made essential to the legal operation of a contract, testament, or trust, and in conducting the reader to the principles and spirit of the several adjudications which he will have to review.

CHAPTER II.

Declarations of Trusts.

29 Car. 2. Cap. 3 Sect. 7, 8, 9.

7. And be it further enacted, that from and after the 24th day of June, 1677, all declarations or creations of trusts, or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will and testament, or else they shall be utterly void and of none effect.
8. Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been if this statute had not been made.
9. And be it further enacted, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

UPON the general principle of law, so much above discussed, whereby the contents and purport of a deed are protected from the encroachments of verbal or extrinsic evidence, an use could never be averred in contradiction to the use expressed in writing. But where a conveyance was made without expressing any use, some distinctions as to the power of creating uses by averment, have apparently existed and *prevailed at common law. A conveyance or assurance upon valuable consideration, moving from the party to whom the conveyance was made, must necessarily have always consolidated with the legal estate that use or equity which, perhaps, in our law has been immemorially contemplated as separable from the mere legal or technical owner-

* [92]
Of this doctrine before the statute of frauds.

ship.(38) Upon which quality of separability in the use from the legal estate was raised the early doctrine of a resultancy of the beneficial interest to the party conveying without valuable consideration, or any accompanying expression declarative of a contrary intention. Though it may be doubted whether an use could be thus construed to result before the statute of *quia emptores*, for until the law of tenures was altered by that statute, the feoffee would hold of the feoffor; and consequently a consideration would arise out of the tenure, which implied certain obligations and services, sufficient, perhaps, to prevent a consequence arising from a presumption of law against alienations purely gratuitous.(a)

Of the resultancy uses.

If, for a want of consideration moving from the feoffee the use was loosened from the legal estate in the land, the party conveying had a *directory* power over it; and as he might have fixed it in the feoffee by simply expressing such intention in the deed of conveyance without any consideration,(b) so the use might be carried by the feoffor's declaration to a third person without writing or consideration; such use being *directed* and not *raised* by the declaration, which was no part of the conveyance; and the conveyance itself *being a mere transaction in *pais*. But there

Of the efficacy of instruments, solemnities, and declarations, to raise uses.

*[93]

(a) Dyer, 146, b. pl. 71. (b) Vide 9 Rep. 10, Dowman's case.

(38) See the 22d question in the dialogue of the Doctor and Student, where the divine does not carry the common law uses up to the fountain of Roman jurisprudence; and the Student seemed to think, that the distinction between the ownership and usufructuary interest or right to the profits, was coeval in our law with the acquisition of property. But read 2 Blackst. Comm. 291. 2 Leon. 14. Lord Raym. 291.

It seems, therefore, that, at common law, only the solemn conveyance, by livery or record, could raise the use by its own virtue, and dispense with the deed for declaring it, as the consideration for raising it; and we are to observe, that with regard to the feoffment, as the act of livery was the operative solemnity, and the conveyance was effectual by parol, an additional reason presents itself for the efficacy of a verbal declaration of the use arising upon it: whereas, in cases where a deed was necessary to effectuate the transfer, as in a grant of rent, a deed was likewise required to declare the uses: and in the covenant to stand seized, the form of the conveyance implied a deed as well as a consideration, to raise and give birth to the use; the obligatory strength of the instrument being incorporated with the consideration of blood to compose the validity and efficacy of the conveyance. The virtue and strength of the bargain and sale of lands at common law was derived from the consideration of the contract, and it may be doubted whether, before the statute of enrolments(c) a bargain and sale of lands was not good without writing, if it stood upon a clear valuable consideration.(d)

Of the doctrine since the statute.

* [94]

The statute 29 Car. 2. has, however, silenced many of these nice distinctions at common law, by imposing a general *restriction on parol declarations of trusts; which word 'trusts' has been judged to comprehend uses.(e)

Presumptive trusts more easily repelled than raised.

We have observed, that to raise or create an use, required a stronger act than to repel its resultancy: and since the statute of uses, the same difference seems to have existed in the courts of equity in respect to trusts. The equity, which arises upon a rule of presumption, is always rebuttable by parol evidence.

By the express words of the statute of frauds, all resulting trusts, and trusts arising by operation of law, are left upon their original footing; such constructive trusts, therefore, whenever they spring out of facts, or the equitable relation of parties to each other, may, by virtue of the said exception, be set up by parol evidence; but where the relative obligations or rights of parties are stipulated and adjusted by written instruments, the instruments must still speak for themselves by expression or implication, and no extrinsic collateral evidence ought to be received to

(c) 27 Henry 8. c. 16. 2 Inst. 675. (a) Leon. 18. (e) By Lord Holt, Vide Holt's Rep. 733.

ingraft other or additional trusts upon the deed by proof of intention, unless upon a ground of fraud or circumvention. And so, though it has been holden that the statute does not extend to trusts of personality,^(f) yet it seems clear, that if such trusts are attempted to be created where there is a written instrument, the principle of law will be sufficient to oppose the admission of parol evidence,^(g) where it is at variance with the expressed or implied operation and intention of such instrument. But if there is a real distinction between contradicting or adding to an instrument, and raising a trust upon it, it may be argued that as trusts of personality are out of the statute, evidence of intentions and declarations may be given to create this supervenient equity, where the subject is personal estate; though, perhaps, this is a refinement bordering upon entanglement, and has involved the great seal in some apparent contradiction with itself. It is certain, however, *that with regard to real estate, although where there is no instrument, and perhaps, in some cases where there is one, parol evidence of facts and circumstances, showing the relation and obligations of parties may be given to raise an equity by operation of law, yet no evidence of declarations or intentions, where the facts and circumstances are themselves insufficient, can be received either as a substantive or an auxiliary ground for the creation of a trust.⁽³⁹⁾

Trusts of personality, not reached by the statute. But the admission of parol evidence to ingraft them upon a written instrument, opposed by the rule of law.

* [95]

One proposition, however, may be received as a standing rule in respect to this part of the subject—that any thing in writing, decisively marking the intention to create a trust, will be effectual without a formal declaration, either as a virtual declaration to satisfy the requisition of the statute, or as the implication of a

If the intention to create a trust sufficiently appears by writing, the statute is satisfied without a formal declaration.

(f) *Nab v. Nab*, 10 Mod. 404. (g) *Vide Fordyce v. Willis*, 3 Bro. C. R. 577.

(39) That a resulting trust shall not be suffered to be raised upon an instrument by parol proofs, is a proposition well supported by the cases, where, upon a purchase, the money has been attempted to be proved to have been advanced, either in part or in the whole, by a party not named in the conveyance. Such parol evidence has always been rejected on the ground of its contradicting the instrument; see *Kirk v. Webb*, Prec. in Ch. 84. *Newton v. Preston*, *ibid*, 103. *Gascoyne v. Thwing*, 1 Vern. 366. *Crop v. Newton*, 2 Atk. 75.

* [96]

trust upon grounds of equitable construction, to put the case within the exception : to which we may add, that though the principal instrument be without either expression or implication of a trust, yet a precedent, subsequent, or accompanying instrument may make the trust manifest, though itself no formal declaration. Accordingly, if J. S. devise lands to one, who is his heir at law, in fee, and gives several legacies, and then makes the devisee his executor also, desiring him to see his will performed according to the confidence he had reposed in him, the testator's real estate is made liable; for it were needless to have devised the estate to his heir at law, unless he intended to make it chargeable with his debts and legacies.^(h) And in the case of *Nourse and another v. Yarmouth*,⁽ⁱ⁾ we have an instance of an effectual declaration of trust, by words so inartificial as not to serve to limit an estate. Upon the same principle, a covenant to make conveyances, or to purchase lands to certain uses, has been deemed a sufficient declaration of a trust, and binding upon the estate.^(k) And so in *Clanrickard's case*,^(l) it was held that if A covenants with B for money, to do all acts which B shall require for assurance to B and his heirs, and levies a fine to B, this covenant and fine shall give to B the whole land.⁽⁴⁰⁾ And notwithstanding the cases stated in the note to *Eales v. England*,^(m) and the case of *Cunliffe v. Cunliffe*,⁽ⁿ⁾ it is fully established, that words of desire, request, or recommendation, are sufficient to create a trust, if the property be certain, and the objects distinctly defined, and the recommendation or desire be not clearly meant to be subjected to the option or controul of the party.^(o) We are to observe too, that, as a court of equi-

(h) 2 Vern. 228. (i) Fin. Rep. 159. (k) *Blake v. Blake*, 2 Bro. P. C. 350. (l) Hob. 275. (m) Prec. Ch. 200. (n) *Ambl.* 636.

(o) *Eales v. England*, Prec. Ch. 200. *Harland v. Trigg*, 1 Bro. C. R. 142. *Malim v. Keighley*, 2 Vez. jun. 333. *Barrow v. Greenough*, 3 Vez. jun. 152. *Pushman v. Filliter*, 3 Vez. jun. 7. *Hobart v. Countess of Suffolk*, 2 Vern. 645. *Starkey v. Brooke*, 1 P. Wms. 390.

(40) By the 4th and 5th Ann. c. 16, sect. 13, it is enacted, that all declarations or creations of uses or trusts of any fines or common recoveries, manifested by a deed, after the levying or suffering thereof, shall be as good in law as if the act of the 29 Car. 2. c. 3, had not been made; which provision was made to obviate doubts which appear to have been entertained as to the effect of the statute of frauds on declarations of uses, subsequent to the assurance made.

ty will not suffer justice to fail for want of an appointment of a trustee; if an estate be given by will to a corporate body, to sell for another's benefit, though the devise is void, yet the trust fastens itself upon the estate in the heir at law.(1)

*In the reports of the case of *Lloyd v. Spillet*,(g) Lord Hardwicke is represented to have used words tending to reduce the instances of trusts arising by operation of law, and, as such, excepted by the statute of frauds, to two, viz. where the conveyance has been taken in the name of one man, and the purchase-money paid by another; and where the owner of an estate has made a voluntary conveyance of it, wherein he has declared a trust with regard to one part of the estate only, without expressing any as to the other part of it.(41) Some words probably accompanied and explained this observation of the Chancellor, (if the observation itself is not incorrectly stated) which would, if they could be recovered, remove the difficulty which every reader of equity cases must have in acceding to it. There would be no end of enumerating the instances of these constructive trusts, or trusts arising by operation of law. Two or three shall be mentioned, and the reader shall be referred to the cases for others. If a trustee purchase lands with the trust-money, and take a conveyance to himself without declaring a trust, and recite or admit that the lands were bought with the trust-money, he will hold the lands in trust for the person entitled to the money.(42) On the same principle,

Of trusts arising by operation of law.

* [97]

(p) *Sonley v. the Clockmaker's Company*, 1 Bro. C. R. 81.

(q) *Bernardiston's Rep. in Chanc.* 388, 2 Atk. 148.

(41) But this must be understood of a partial declaration of the trust for *another person*; for if a partial trust or use is limited to the grantor himself, it will prevent the resultancy of that part of the estate whereof no use is declared, as in the cases of *Rawley v. Holland*, Vin. 22. p. 189. *Adams v. Savage*, 2 Salk. 679.

(42) *Deg v. Deg*, 2 P. Wms. 412. But where a trustee purchases lands out of the profits of the trust estate, and takes the conveyance in his own name, though perhaps, if he cannot make other satisfaction, these lands may be sequestered, yet they cannot be decreed to be held in trust, any more than if A borrows money of B, and purchases land with it, such purchase can be held to be in trust for B. To construe it a resulting trust would be to contradict the deed. Mr. J. Powell cited the case of *Walter de Chirton*, Prec. in Ch. 88, who was the king's receiver, and who was found to have purchased lands with the king's

if a guardian or *trustee for an infant renew a lease,^(r) or if a mortgagee,^(s) whose mortgage was taken in the name of a trustee, purchase the equity of redemption in the name of the same trustee, without any declaration of trust, a trust results to the mortgagee in one case, and to the infant in the other : so it has been holden, that the grant of the next avoidance of a church to a person without his privity, is a resulting trust for the grantor.^(t) Thus also, where there were three lessees under a church, and one of them surrendered the old lease, and took a new one in his own name, it was holden a resulting trust for all the original lessees.⁽⁴³⁾ The cases in the margin exhibit other examples of the same trusts, of which the jurisdiction of courts of equity is so fruitful.⁽⁴⁴⁾

* [99]
Of the proof
of the result-
ing trust,
where the
conveyance
is taken in
the name of
one man and

*The editor^(u) of Atkins's Reports, who has obliged the profession with many judicious comments, has illustrated the first of Lord Hardwicke's two instances of a trust arising by operation of law within the meaning of the statute, in a concise note, wherein the distinctions on this point are thus stated : " If the consideration money is expressed in the deed to be paid by the

(r) *Lee v. Vernon*, 7 Bro. P. C. 432.

(s) *Acherley v. Acherley*, 4 Bro. P. C. 67, et vid. 3 P. Wms. 250, n. A.

(t) *D. of Norfolk v. Browne*, Prec. Ch. 80.

(u) Vide *Lloyd v. Spillet*, 2 Atk. 150. edit. Sanders, note 2.

money, to show that this was not held to be a resulting trust even in the king's case. He was of opinion, therefore, that the plaintiff could not be relieved, and the Lord Chancellor concurred with Mr. J. Powell.

(43) *Palmer v. Young*, 1 Vern. 276, and see *ex parte Grace*, 1 Bos. et Pull 376. See also *Lyster v. Dolland*, 1 Vez. jun. 431. Contributions to the payment of the purchase-money by several parties in equal shares and proportions, where a lease is taken in the names of all, will turn the survivor into a trustee.

(44) *Sonley v. the Clockmaker's Company*, 1 Bro. C. R. 81. *Stonehouse v. Evelyn*, 3 P. Wms. 252. *Robinson v. Taylor*, 2 Bro. C. R. 589. *Spink v. Lewis*, 3 Bro. C. R. 355. *Digby v. Legard*, 3 P. Wms. 22, note 1. *Countess of Bristol v. Hungerford*, 2 Vern. 645. *Hutchins v. Lee*, 1 Atk. 447. This last was a case of an implied trust, between an assignor and assignee of a lease ; but it should seem that there cannot well be an implied trust between lessor and lessee ; for every lessee is a purchaser by his contract and his covenants, and therefore it has been held, that if there is any trust intended, it ought to be declared in writing. Vide *Pilkington v. Bayley*, 7 Bro. P. C. 526.

person in whose name the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted *after the death of the nominal purchaser*, to prove a resulting trust, for that would be contrary to the statute of frauds and perjuries; for which he cites the authorities which are mentioned in the margin.(x) But if the nominal purchaser, in his life-time, gives a declaration of, or confesses the trust, then it takes it out of the statute, for which he cites *Ambrose v. Ambrose*.(y) and *Ryall v. Ryall*.(z) So if it appears on the face of the conveyance, whether by recital, or otherwise, that the purchase was made with the money of a third person, *that will create a trust in his favour*.”(a)

the purchase
money paid
by another.

It should seem, however, that this confession of the trust by the nominal purchaser, to countervail a declaration in writing, and create a trust for the party advancing the money, cannot be established by a third person, but must be made under a judicial examination upon oath, or by the party's own answer in equity. This seems understood both in the case of *Ambrose v. Ambrose*, and *Ryall v. Ryall*, above referred to; and appears to flow from the proposition before stated; for, during the life of the nominal purchaser, no proof can be received of his parol confession, as not being the best existing evidence; and, after his death, it is mere parol evidence contradicting the deed, and not of strength to raise a resulting trust.(45)

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(x) *Kirk v. Webb*, Prec. Ch. 84. *Walter de Chirton's case*, ibid, 88. *Heron v. Heron*, ibid, 163. *Newton v. Preston*, ibid, 103. *Gascoyne v. Thwing*, 1 Vern. 366. *Hooper v. Eyles*, 2 Vern. 480. *Crop v. Norton*, 2 Atk. 74. (y) 1 P. Wms. 321. (z) 1 Atk. 59.

(a) *Kirk v. Webb*, Prec. Ch. 84. *Deg. v. Deg.* 2 P. Wms. 412. *Young v. Peachey*, 2 Atk. 254.

(45) In *Willis v. Willis*, 2 Atk. 71, it is reported to have been said by the court, that there was another way of taking a case out of the statute, and that was by admitting parol evidence, to show the trust, from the mean circumstances of the pretended owner of the real estate, which makes it impossible for him to be the purchaser. But this case is not regularly reported, and as the reporter has only given us a short sentence, without the context, we may reasonably doubt its authenticity.

That the declaration of trust by the nominal purchaser at any time during his life, will be sufficient to establish it, and to establish it by relation to the time of the purchase, was strongly decided by Lord Cowper, in the above cited case of *Ambrose v. Ambrose*; for unless such retroactive effect had been given to the subsequent declaration, the custom of London would have been let in during the interval between the purchase and the declaration, to entitle the widow to the interest and profits of the fund as personal estate.(46)

Where land is bought with the purchaser's own money, whether evidence may be given to show that the purchase was made on the behalf of another person.

* [101]

But if these restrictions are imposed on the admission of evidence, when offered to show that a party has only purchased an estate in behalf of another who really advanced the money, which is a case wherein the evidence seeks to create a trust by operation of law, it must follow, in consistency of principle, that a bill to compel a conveyance from the purchaser of lands, bought with his *own* money, on the ground *of an alleged unwritten agreement by the defendant to purchase it on the plaintiff's behalf, must fail as a still less plausible endeavour to overthrow the provisions of the statute; for in such a case the proofs would tend to set up a trust on the foundation of a special contract, without writing, and not to raise upon facts a resulting trust by operation of law. This was, however, attempted before Lord Keeper Henley, in the case of *Bartlett v. Pickersgill*; (b) but the bill was dismissed with costs. Nor was the plaintiff considered as standing on better ground, by having afterwards succeeded in a prosecution by indictment for perjury assigned as having been committed by the defendant in his answer to the allegations of the bill, by denying the agreement; for upon his coming again to equity after the conviction of the defendant, and

(b) Trin. T. 32 and 33 G. 2. in Chancery, vide 4 East, 577. MS. note, taken by Mr. J. Aston, and read by Lord Ch. J. Ellenborough.

(46) Where the purchase-money comes out of the pocket of the *father* of the nominal purchaser, this has been considered as a circumstance of evidence to rebut the resulting trust; at least, where the son has not been advanced, or but in part advanced, or emancipated. In which respect the law of trusts seems to agree with the law of uses, before the statute of uses; for if a man made a conveyance by feoffment to his son, no use resulted to the father by reason of the consideration of blood, which confirmed the beneficial interest to the son.

grounding thereon a petition for leave to file a supplemental bill, the Lord Keeper treated the petition as he had before done the original application.

We observe, that the clause of the statute respecting trusts is worded very differently from the Fourth Section, which requires the agreement⁽⁴⁷⁾ itself to be in writing signed; whereas the Seventh Section requires only that all creations or declarations of trusts should be *manifested and proved* by some writing, signed by the party. It is on the strength of this peculiarity in the wording of the clause, that letters and other written documents, though long posterior in date to the transaction *itself, have been admitted in courts of justice to have an operation equivalent to that of a formal and coeval declaration of trust. Thus, in *Foster v. Hale*,^(c) the Lord Chancellor Loughborough entirely agreed with the Master of the Rolls,^(d) in adopting the letter as a clear declaration of trust, by which, he said, he meant *clear evidence in writing*, that there was such a trust. It is not necessary, continued his lordship, that it should be a declaration, but a writing, signed by the party, may be evidence of a trust admitted in that writing. Nor is it necessary to produce an instrument expressly framed for the purpose of acknowledging the trust; it is fully sufficient, if the recognition or admission of it is incidentally made in the course of a correspondence: and in the above case, though the parol declarations of the party were adverse to the inference of a trust, yet as a trust was clearly admitted by his correspondence, such evidence prevailed. It was in proof, indeed, that he had refused to execute a declaration, but it seemed to the court that such refusal had rather the aspect of temporary ill-humour, than of a deliberate denial of the trust. But when letters are to manifest a trust, there must be a clear demonstration that they relate to the subject. And it is also ne-

Of the difference in the wording of the 4th and 7th sections, the former requiring the agreement itself to be in writing, the latter only that declarations of trusts should be *manifested and proved* in writing. And of the difference of construction founded on this difference in the language.

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(c) 5 Vez. jun. 308. (d) See the case as before his honour Sir P. Arden, 3 Vez. jun. 696.

(47) By the late case of *Wain v. Warlters*, 5 East 10, the court of K. B. has given a strong effect to these words requiring the *agreement* to be in writing; it is there regarded as making the *consideration* of the agreement necessary to be stated in writing, as being essentially constitutive of its legal efficacy, and properly making an integral part of it. See the second preliminary topic of this 1st part of the 3d chapter.

cessary to their effect, that the trust should be proved *in toto*, though it appears as well from the above cited case of *Forster v. Hale*, as from the cases of *Tawney v. Crowther*,^(e) and *O'Hara v. O'Neil*,^(f) that the terms may be supplied *aliunde*, and that if the letters afford evidence of the existence of a trust, supplementary proof as to the objects, and particulars thereof, may be drawn from any other documents.

Of the trusts implied for the sake of defeating fraud.

* [103]

But wherever a declaration of the trust has been prevented by fraud and deceit, or wherever the creation of a trust has offered itself as the means of frustrating fraudulent contrivance, and affording substantial justice to the victim of another's artifice, courts of equity have not suffered the letter of the statute to embarrass the relief, and to protect what it was framed to prevent. Thus in *Thynn v. Thynn*,^(g) where a man made a will, and named his wife executrix thereof, and the son of the testator persuaded his mother to procure him to be appointed executor in her stead, by promising to be a trustee for his mother, which was accordingly done, and a new will made, giving but a small legacy to the wife; the son was made a trustee for his mother on the ground of fraud, notwithstanding the Seventh Section of the statute of frauds and perjuries. The relief has been uniform in similar cases, to some of which, among a great many in our books of equity reports, the reader is referred in the margin,^(h) to save a tedious repetition; and to terminate with convenient brevity the discussion of these clauses of the statute, respecting the creation, declaration, and assignment of trusts, much of which has been anticipated in the introductory chapter.

(e) 3 Bro. C. R. 161, 318. (f) 2 Brd. P. C. 39. (g) 1 Vern. 296.

(h) *Roswell v. Every*, 4 Vin. Abr. 395. pl. 3. *Davenish v. Baines*, Prec. in Ch. 3. *Reech v. Rennigate*, Amb. 67. *Barrow v. Greenough*, 3 Vez. jun. 152.

CHAPTER III.

Contracts.

29 Car. 2, c. 3, sect. 4 and 17.

4th Sect. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, 1677, no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; 2, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; 3, or to charge any person upon any agreement made in consideration of marriage; 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto, by him properly authorised.

17th Sect. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, no contract for the sale of any goods, wares, and merchandises, for the price of 10*l*. sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised.

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Order of the
3d chapter :
1st part containing preliminary and general topics. 1. Form of the agreement. 2. Contents. 3. Signature.

*BEFORE the particular articles of these sections are separately considered, it seems proper, first, with reference to the subjects thereof in general, to treat of some important points, which, though they might more naturally, perhaps, be brought into discussion under one or other of the distinct heads of the section, yet having a general bearing, and being applicable to more than

2d part. Contracts concerning lands, &c.

3d part. Contracts for the sale of goods, and agreements not to be performed within a year.

4th part. Promises made in consideration of marriage.

5th part. Promises by executors, &c.

6th part. Collateral promises.

one of those heads, I have thought it better, for avoiding repetition, to enter upon the examination of them in a general way ; reserving such matters as more distinctly appertain to the several provisions for a separate view of them under their proper titles. In the prosecution of which plan, in the first place, will be considered what *constitutes* a written agreement as to the *form* thereof, to satisfy the requisitions of the statute ; secondly, under the same division or part will be inquired, what the written agreement or contract ought to *comprise* ; and lastly, what is a sufficient compliance with the statute in respect to the *signing*. After these points, constituting the first part of this third chapter, shall have been concisely treated, the separate consideration of the several matters of the 4th section, and the provision constituting the whole of the 17th section, will take up the remaining parts of the same chapter.

PART I.

Form of the agreement.

Letters.

First Preliminary Topic.—An agreement, negotiated by word only, often becomes the subject of a subsequent correspondence in writing ; frequent occasions, therefore, have arisen in courts of justice since the statute was made, to agitate the question, whether a letter, under particular circumstances, is a contract in writing within the terms and exigency of the 4th section of the statute. One general rule for determining the question in the majority of instances is furnished by the early case of *Seagood v. Meale*,^(a) wherein it was held that a letter will never operate as a written agreement so as to satisfy the statute, unless it distinctly specifies or ascertains the *terms* of the agreement : for if it contain only evidence of ^{*}the existence of an agreement without fully declaring its purport, the substance of the contract is left to be explored through the medium of verbal testimony, in direct opposition to the statute of frauds. In the case last mentioned, a person had verbally agreed with another to sell him some houses, and in consequence of such agreement had written a note to a mortgagee of the premises, requesting him to deliver the writings, relating to the property, to the bearer, as he had agreed to dispose of them : it was contended that this letter was a recognition of the contract in *writing*, and ought to be considered as sufficient to answer the intention of the statute ; but the

* [106]

court thought clearly otherwise, grounding its opinion on the want of a proper specification of the terms in the letter ; though some doubts may be entertained, whether a letter written to a third person, and a stranger to the contract, could, however explicit it might be in describing the terms of the contract, be received as a memorandum or note within the meaning of the statute.(48) But we are to observe, that the letter in *Seagood v. Meale*, though it did not immediately pass between the parties to the contract, directed something to be done in pursuance of the contract and preparatory to its accomplishment, and was thus, in effect, a medium of negotiation between the original parties.

A letter to operate as an agreement in writing must contain a specification of the terms.

In *Clerk v. Wright*,(b) the defendant had verbally agreed to sell an estate to the plaintiff, in confidence of which agreement, the plaintiff had been several times to view the premises, and had given orders for conveyances(49) to be drawn and engrossed: the defendant afterwards sent a letter to the plaintiff, informing him, that at the time of his contracting for the sale of the estate, the value of the timber was not known to him, and the plaintiff should not have the estate unless he would give a larger price for it. The bill was brought to have the agreement carried into execution, but the statute of frauds was pleaded, and allowed; the Chancellor observing, that the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein specified.

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Upon similar grounds, a letter promising a marriage portion, but not reducing it to any certainty,(50) was considered as insuf-

The matter of the agreement must be reduced to certainty.

(b) 1 Atk. 12 ; and see *Whaley v. Bagenal*, 6 Bro. P. C. 45.

(48) Though it was said by Lord Hardwicke in *Welford v. Beazely*, 3 Atk. 503, that "there have been cases where a letter written to a man's own agent, setting forth the terms of the agreement as concluded by him, has been deemed to be a signing within the statute." But such an act is supposed to be done with the direct purpose of carrying the treaty into effect, and not as a mere communication by letter. See the case of *Ayliffe v. Tracy*, 2 P. Wms. 64.

(49) Instructions to counsel to prepare the writings are never held to be material ; and after they are drawn and engrossed according to such instructions, the party may refuse to execute them ; said by Lord Chancellor Parker, in *Montacute v. Maxwell*, 1 P. Wms. 619.

Instructions to counsel insufficient.

(50) There is a case, however, which, though it seems to have been grounded on its own particular circumstances, is sufficient to show that

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And the letter should be more than a bare communication to a third person.

But the matter of the agreement may be reduced to certainty by reference to exterior documents or facts.

sufficient to satisfy the third clause of the 4th section ; and a letter written by a father to his daughter, promising to give her 3000*l.* on her marriage, but which was not shown *to the intended husband, was held to afford no foundation for a decree, as having no ingredient of equity ; (c) although, if the intended husband had seen this letter, and had married the daughter on the encouragement it gave him, this would have materially altered the case in respect to the statute ; and it has been held that the statute shall not prevail where this is the state of the transaction. (d)

But if a letter contains the terms of an agreement, distinctly set forth, (e) or refers to another paper which contains the terms of the agreement explicitly stated, even though such prior written document be without a signature ; (f) or if it refers to something in itself certain, (as to the custom of the country in an agreement for a lease) (g) - the statute has been held to be satisfied. So in a late case, (51) where an order had been given for a

(c) 2 P. Wms. 65, *Ayliffe v. Tracy*. See it differently stated in 9 Mod. 3.

(d) See Eq. Ca. Abr. 49. *Wankeford v. Fottherly*, 2 Vern. 322. *Taylor v. Beech*, 1 Vez. 297.

(e) 3 Atk. 503.

(f) 3 Bro. C. R. 318, *Tawney v. Crowther*.

(g) 1 Vez. jun. 330, *Brodie v. St. Paul*.

this rule, as to the reduction of the terms to a certainty, is not to be strained to an inflexible rigour. In *Allen v. Harding*,* the defendant being curate of Newcastle, had covenanted to build a house on the glebe land ; and upon his refusing to perform his engagement, the plaintiff brought his bill for a specific performance. The defendant insisted on the uncertainty of the agreement, which neither specified the time when the house was to be built, nor what sort of a house it was to be. But the Chancellor observed, that the covenant was designed for the benefit of the church, and that, therefore, if it could possibly be specifically performed, it ought ; and decreed a convenient house to be built, and for that purpose, each person was to choose two commissioners, neighbouring gentlemen ; and if they could not agree, then they were to resort to the ordinary of the diocese to settle the matter between them.

(51) *Saunderson v. Jackson*, 2 Bos. et Pull. 238. But where the parol evidence is to ascertain what is referred to, the subject of the reference being not sufficiently decided and distinct upon the face of the

* 2 Eq. Ca. Abr. 17.

quantity of goods, and a bill of parcels delivered at the same time to the buyer, a subsequent letter written and signed by the vendor, referring to the order, was connected with the bill of parcels, so as to create a sufficient contract in writing within the statute.

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Thus, too, if an instrument has been designed as a deed, but from the omission of circumstances requisite to its validity, or from a change in the relative situation of the parties, it is deprived of its specific operation, it will nevertheless be received in equity, as an agreement, or as evidence of an agreement: as, where a woman, being about to marry, gave a bond to her intended husband, with a condition, that in case the marriage should take effect, she would convey all her lands to her husband and his heirs; and the marriage having taken effect, the wife died, and then the husband died, and the heir of the husband brought his bill against the heir of the wife, to compel a conveyance; it was determined, that the bond was a written evidence of the agreement of the party, and that that agreement, being for a valuable consideration, should be executed in equity. (*h*)

An instrument designed as a deed, but rendered void by circumstances, may operate as an agreement in writing to satisfy the statute.

But to be binding within this statute, a writing should always import the assent and privity of both the parties in respect to the treaty or transaction itself. A mere entry, therefore, in a steward's book of contracts with the tenants, was not allowed to be evidence itself of an agreement for a lease between a lord and a tenant. (*i*)

It should import the consent and privity of both parties.

In *Cass v. Waterhouse*, (*k*) a particular in writing had been distributed, with an intention to sell by auction certain leasehold houses, including some which were in mortgage, and others not in mortgage, and, other purchasers not bidding enough, Cass came to a private agreement with the seller for the purchase of

A particular of sale, whether sufficient as an agreement.

(*h*) *Cannel v. Buckle*, 2 P. Wms. 242. (*i*) *Charlewood v. The Duke of Bedford*, 1 Atk. 497. (*k*) *Prec. in Chan.* 29.

document itself, as where a paper is referred to as containing the terms of a lease, if the certainty does not sufficiently appear by referring to the paper without further evidence, the agreement is not ascertained in writing according to the statute; thus, if parol evidence be necessary to show which of the clauses contained in the paper referred to, was read at a meeting between the parties, the statute is in direct opposition to such proofs, and accordingly they cannot be admitted. See *Brodie v. St. Paul*, 1 Vaz. jun. 326.

*[110]

all the houses, having previously seen the particular. A conveyance was accordingly made, restrained by the words of it to the houses in mortgage ; whereas it appeared pretty clearly *that the intention was to pass all the houses, as well those which were in mortgage as those which were not ; but the seller, who was the administratrix of her deceased husband, being informed she was entitled to the two houses not in mortgage in her own right by survivorship, the husband having purchased them in the joint names of himself and wife, refused to let the purchaser have this part of the property ; and the bill to have those houses conveyed was dismissed ; for, though the court seemed satisfied, that the defendant had intended to convey *all* to the purchaser, and had thought that she had actually so done ; yet, there being no agreement in writing as to the two houses not comprised in the conveyance, the statute of frauds and perjuries stood full in their way : for though the particular was in writing, and these two houses were mentioned in it as well as the others, and was proved to have been shown to the purchaser, yet it was not proved to have been shown to him *on* his purchase, nor that he purchased *by* it. The courts, indeed, do not incline to consider a particular or list of subjects proposed for sale, an agreement within the statute, unless it has additional weight and a new character imparted to it by the adoption and confirmation of the parties, and moreover contains terms and stipulations as to quantity, description, and price, so as to render it convertible into a contract by the proper authentication of it as such.

To a bill for the specific performance of an agreement for the sale of certain freehold premises, and stock in trade, principally consisting of timber for ship-building, and some houses, the defendant pleaded the statute of frauds. It appeared, that, pending the negotiation, the defendant delivered to the plaintiff a particular of the premises and property to be sold, and the terms and conditions of the sale, all in his own hand-writing, and signed by him ; when it was agreed, that the plaintiff should have till a certain day to consider of the purchase as he objected to the price.(52) It was afterwards agreed, that the purchase

(52) *Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest.* Lord Bacon's Maxims, Reg. 20.

should take place *at a reduced price ; and verbal instructions for the conveyance were given by both parties to an attorney, to whom the defendant delivered the particular as instructions for the deed, which was prepared, read over, and approved by both parties. The court of exchequer, nevertheless, held, that these circumstances were not enough to make this a sufficient agreement within the statute. The particular not having been made out as evidence of any agreement, but merely as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value ; that it was delivered into the attorney's hands for the same purpose, and was signed merely to authenticate it as such list ; that it was delivered in as the foundation of a sale at a higher price, and could be no evidence of the terms of the second contract, or even of its existence ; since, with the price, the parcels also might have been varied ; that the instructing an attorney to draw conveyances, and his doing so, were no part performance of a contract : that the agreement being void as to the land, must be void also as to the personal property which was to be sold with it : it was one *entire* contract.(53)

(53) It seems to have been admitted by the Court, that the contract, as far as respected the sale of the chattels, was not within the statute ; and as the argument at the bar for the defendant contended for the validity of the sale of the stock on the ground of its being *executory*, it seems as if the court of C. B. admitted that doctrine, by holding that part of the contract which respected the sale of the goods invalid, not as made so by the statute, but as constituting a portion of an *entire* contract, *partially* within the operation of the statute. But the Court of Common Pleas in *Rondeau v. Wyatt*, 2 H. Bl. 63, and the Court of King's Bench in *Cooper v. Elston*, 7 T. R. 14, have most emphatically decided, that a contract for the sale of goods to be delivered at a future period, is as much within the statute as where the goods are to be delivered immediately. Upon the clear authority, therefore, of both these cases, the part of the contract in the above case in the Exchequer which respected the sale of the stock, was within the operation of the 17th section of that statute ; and, therefore, the Court of Exchequer needed not to have resorted to the doctrine of holding an entire contract good in the whole, or void altogether ; since the same law, by which the real part of the contract was invalidated, was equally applicable to the personal ; and as to any supposed difference with respect to the operation of the particulars on a sale of goods and a sale of land, such distinction has no support given to it by the words of the

A contract is entire, and, therefore, if any part is void by the statute, the whole must fail.

and the whole must stand or fall together; that it never could be the intention of the parties, that the stock should be sold apart from the premises, and the agreement being for one entire sum, the court could not separate it. (1)

* [112]
Of the sale by auction; and of the distinction taken in this respect between lands and goods.

* [113]

*In the case of *Simon v. Motivos*, (m) wherein it appeared that an auctioneer had knocked down a lot to the highest bidder, and put down his name in the usual manner as the purchaser of the goods, and the purchaser came the next day and saw the goods weighed; an objection was made, that the contract not being in writing, was void by the statute of frauds; but the court were clearly of opinion, that the auctioneer must be considered as the agent for the buyer after knocking down the hammer, as well as for the seller, and that his setting down the buyer's name and the price was sufficient to take it out of the statute. They laid also some stress upon the buyer's coming the next day and seeing the goods weighed; and they inclined generally to think, that buying and selling at auctions was not within the statute of frauds. But in the **nisi prius* case of *Stansfield v. Johnson*, (n) where the case of *Simon v. Motivos* was cited, Eyre, C. J. was of opinion, that the authority of that case applied only to the sale of goods. The same distinction was recognized by the court of common pleas in *Walker v. Constable*, (o) and in the case of *Buckmaster v. Harrop*, (p) was ratified by the adoption of the present Master of the Rolls, (q) who observed, that whatever is the authority of the case of *Simon v. Motivos* or *Metivier*, it has been held not to extend to land. (54)

(1) *Cooke v. Tombs*, Anstr. 420. *Lea v. Barber*, *ibid*, 425. n. S. P. (m) 3 Burr. 1921 (n) 1 Esp. Ni. Pr. Ca. 107. (o) 1 Bos. et Pull. 306. (p) 7 Vez. jun. 344. (q) Sir Wm. Grant.

statute; though the cases upon auctions seem to have proceeded upon such an imagination. See *Walker v. Constable*, 1 Bos. & Pull. 306. 1 Esp. Ni. Pr. Ca. 107. 7 Vez. jun. 341. The doctrine, however, of the Court of Exchequer in the abovementioned case of *Cooke v. Tombs*, that the contract as to that part of it which concerned chattels, must fail as being involved with the rest of the contract so as to be incapable of separation, seems to be perfectly warranted in its principle, and has been confirmed by the subsequent case of *Chater v. Beckett*, 7 T. R. 201.

The agent's authority

(54) It appears from the resolutions concerning sales by auction, that the agent's authority need not be in writing, which point was directly

It should be remembered, that the ground of the decision of *Simon v. Motivos*, was the constructive agency of the auctioneer for the buyer after knocking down his hammer, (55) so that upon a sale of chattels for the price of 10*l.* or upwards, within the 17th section of the statute, if the person making the memorandum of the purchase by the best bidder, is not in a capacity to be considered by law as the agent for both parties, the sale cannot be enforced for want of a memorandum or note in writing, such as the statute requires. Thus, in *Symonds v. Ball*, (r) where the aftermath of land was sold by auction, by the corporation of a borough, and the town clerk who acted as agent for the sellers, wrote down the name of the purchaser in the printed catalogue, and the price to be given, for which the purchaser at the same time gave his promissory note; the court were clearly of opinion, that neither the memorandum so made by the town clerk, nor the note given by the purchaser, could be deemed a sale or demise in writing to answer the statute, nor could they be coupled together in construction for that purpose. (56)

• [114]

(r) 8 T. R. 151.

determined in *Waller v. Hendon and Cox*, Vin. tit. Contract and agreement (H) 45, in which the decree of the Master of the Rolls was affirmed on appeal by Lord Macclesfield, who said that, an authority to treat or buy for another may be good without writing, though the contract itself must be in writing. *Wedderburne v. Carr*, in the Exchequer, T. T. 1775, cited in 3 Woddeson's Lect. 427. See *Coles v. Trecothick*, 9 Vez. jun. 251. need not be in writing.

(55) According to *Payne v. Cave*, 3 T. R. 148, the bidder might retract his bidding at any time before the hammer was knocked down, till which time there was the *locus penitentiae*.

(56) If the inclination of the bench in the above cited case of *Simon v. Motivos*, were to prevail, it would reduce all these cases to a level, by taking them all out of the operation of the statute. But that case was decided in favour of the seller, not upon the broad ground of treating it as out of the purview of the statute of frauds, but on the inference of agency in the auctioneer on the part of the buyer as well as the seller, and the validity of his entry of the buyer's name, as a memorandum and signature to satisfy the requisition of the statute in question. The case, in the text, of *Symonds v. Ball*, it is plain, did not adopt the hint afforded by the judges in *Simon v. Motivos*, of emancipating the case of auctions altogether out of the statute; for, the

Purchases at a bidding before a master in Chancery, out of the statute.

*Where, however, an estate is purchased at a bidding before a master of the court of chancery, the case is said by Lord Hardwicke to be certainly out of the statute.^(s) And his lordship added, that he should not hesitate to carry into execution against the representative a purchase by a bidder before a master *without subscribing*, after confirmation by the master's report.⁽⁵⁷⁾

It cannot but have struck the reader, that the cases which have set up a distinction between land and chattels, as to the influence of the statute on sales by auction, have imposed on us an acquiescence due to their authority, rather than to their reason. If he recurs to the transcript of the sections at the head of this chapter, he will not discover in the language of the 17th, a weaker stress laid on the necessity for a written evidence of the contract signed by the party, or his agent, than is contained in the 4th section, as to the subjects comprised within it. In a very late case,^(t) the present Chancellor observed "that it was very singular, that after the case of *Simon v. Metevier*,^(u) and

(s) See 1 Vez. 221, *Attorney-General v. Day*. (t) *Coles v. Trecothick*, 9 Vez. jun. 249. (u) 3 Burr. 1921.

want of a signing by the defendant himself, or by an agent properly authorised by him, was the reason of the judgment of the court in his favour.

These cases, with a distinction between sales of land and goods, suppose the efficacy of the signature of one of the parties, without that of the other to bind the person signing; a doctrine recognised expressly in chancery in the case of *Seton v. Slade*.^{*} But are we to hold, that the buyer is bound by such entry of his name by the auctioneer, without also understanding that the seller is become bound at such stage of the transaction to the buyer? Or are we warranted in concluding, that the name of the seller is sufficiently signed by being printed on the particular of sale? The knot in which these and some other difficulties have entangled this question, may be cut by adopting the opinion of the judges in *Simon v. Motivos*, and understanding it as extending to sales of land as well as of goods; it is not likely to be unloosed by the multiplication of artificial distinctions. A line of some breadth should be taken in deciding questions upon a law framed for the prevention of fraud and perjury, and for promoting honour and certainty in the transactions of property.

(57) And a verbal agreement between the solicitors of a mortgagor and mortgagee, the latter of whom had filed a bill for a foreclosure, and for the sale of the estate and payment of the principal debt, in-

* 7 Vez. jun. 265.

without disturbing it, it was held *à nisi prius*, by Lord Ch. J. Eyre, that it would not do as to land. Why not? the form of the two clauses is not the same; but the terms as to the memorandum "are exactly the same. The case was followed, certainly without much argument or discussion upon the bench, according to the report, in *Walker v. Constable*."^(x) After such an opinion from such a man, with so much appearance of reason on his side, this point, though in the case above referred to, and again in *Buckmaster v. Harrop*,^(y) it was taken to be settled, can hardly be said to be at rest.

* [116]

Second preliminary topic.—On the second head of inquiry into which, at the beginning of this chapter, the general consideration of the objects of the 4th and 17th sections of the statute was proposed to be divided, much will not be necessary to be said. It has already been sufficiently shown, that the written agreement or memorandum must set forth distinctly the terms of the contract or promise, either by its own contents and expression, or by direct reference to something extrinsic, which may render it intelligible and certain. By the resolution, however, of the judges of the court of King's Bench, in a very late case,^(z) it has been decided, not to be enough that the terms of the agreement or contract are expressed in writing, but that it is also necessary, that the *consideration* upon which it was supported as a good agreement at common law, should be set forth in writing.

That the consideration as an integral part of the agreement must be expressed in writing.

This decision appears principally to affect those promises which come under the 2d and 3d clauses of the 4th section, viz. the personal undertaking of an executor or administrator, to answer for the debt of his testator or intestate, and the special promise to answer for the debt, default, or miscarriage of another. The other contracts, regarding sales, and bargains, and marriage provisions, do, for the most part, of necessity express or import the consideration by which they are moved; but a written undertaking by an executor to pay his testator's debt, without

(x) 1 Bos. et Pull. 306. (y) 7 Vez. jun. 344. (z) 5 East 10, Wain & Writers.

terest, and costs, was permitted to be established by evidence, as not being within the purview of the statute. 3 Bro. C. R. 334, Cox v. Peele, in appeal from the Rolls.

mention of any superadded motive *personal to himself, imports only the consideration of his duty as executor, and the promise which arises from it will, of course, only be measured by the extent of the consideration. A promise in writing to pay the debt of another, if no special consideration moving from the party promised is expressed, imports no consideration at all in itself; for there is nothing of reciprocity supposed by the bare transaction. The judges, according to the report, founded their decision upon the extent and cogency in law of the word 'agreement,' used in the 4th section of the statute,(58) and thereby

*vide. however on the
subject of this de-
cision. See also
of vendors. p. 48
re (2)*

(58) The word 'agreement' does not occur in the 17th section, regarding the contracts for the sale of goods for the price of 10*l.* or upwards; but the words are, "that some *note or memorandum* in writing of the bargain be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorised." Therefore, in *Egerton v. Matthews*, 6 East, 307, determined since *Wain v. Warlters*, in the King's Bench, which was a case governed altogether by the 17th clause, it was clearly held that it was not necessary that the writing, to be effectual within that clause, should set forth the consideration. A case very important in its consequences, as it implies, that had the word in the 17th section been 'agreement' instead of 'note or memorandum,' the plaintiff must have been nonsuited for want of a consideration sufficiently exhibited in writing, which was as follows: 'We agree to give Mr. Egerton 19*d.* per lb. for thirty bales of Smyrna cotton, customary allowance, cash 3 per cent as soon as our certificate is complete. Signed by the defendants the buyers.' The writer hopes for pardon, if with great deference he submits that there is a consideration for the promise plainly stated in this writing. So much money is to be paid for such goods. This was the consideration, and this was stated. But this seems to be now considered as not sufficient; and it is implied in the case just cited, that the instrument itself where the case is within the 4th section, should import and comprehend in itself a perfect mutuality of obligation, otherwise the whole agreement is not to be considered as being in writing. And according to this doctrine, under that section of the statute, both parties in most cases must sign the instrument, otherwise the full consideration for the signing by the party charged, will not appear upon the instrument itself; a doctrine rising greatly above the level of antecedent opinions and authorities. See *Cotton v. Lee*, cited in 2 Bro. C. R. 564, *Coleman v. Upcot*, 5 Vin 527. *Buckhouse v. Crosby*, 2 Eq. Ca. Abr. 32, pl. 44. *Seton v. Slade*, 7 Vez. jun. 265. *Fowle v. Freeman*, 9 Vez. jun. 351, and what, under this doctrine, if it be the doctrine, is to become of the authorities giving an effect to letters equivalent to agreements.

required to be *in writing; which they were of opinion, must be understood as including the idea of whatever was constituent of its legal efficacy. They considered it as implying the assent of †[119]

Wain v. Warlters goes only the length of deciding the necessity of stating the consideration. But when coupled with the succeeding case of Egerton v. Matthews, the court, by these adjudications, seems to say, that, as by an agreement must always be understood the assent of two or more minds, reciprocally expressed and mutually binding, and which must be so complete and certain, that each party may have an action upon it, an instrument so perfected, is necessary to satisfy the 4th section of the statute of frauds.

The judgment in Wain v. Warlters must be understood to rest wholly upon the signification and force of the word *agreement*, in legal understanding : but the consideration must be regarded as integrally incorporated with the very idea and definition of the term *agreement*, to distinguish the principle of this case from the rule in respect to all other cases of consideration, wherein the uniform course of the courts has been to admit parol and extrinsic evidence of its existence and quality. It has always been held, indeed, that the use and intent of an instrument must not be varied or contradicted by parol ; and that therefore it cannot be averred against the indentures made for declaring the uses of a subsequent fine, recovery, or other assurance, that after the indentures, and before the assurance, it was settled by mutual agreement, that the assurance should be to other uses. See the Countess of Rutland's case, 3 Rep. 26. a. But it has always been considered; that in respect to evidence, there is a great difference between *use and consideration* ; for if no particular consideration is specified, any consideration may be shown by evidence ; and even where a fine, feoffment, or conveyance, is made upon an *express* consideration, a man may aver by word *another* consideration, provided such *other* consideration is consistent with the consideration expressed. Cromwell's case, 2 Rep. 76. a. Thus too, in Mildmay's case, 1 Rep. 176. a. it is said, that if a man by deed indented and enrolled, according to the statute, *for divers good considerations*, bargains, and sells his land to another and his heirs, the deed is inoperative, for no use can be raised upon such a consideration ; but the bargainee in such case, may aver, that money, or other valuable consideration, was given, and if the truth be such, the bargain and sale shall be good, for which was cited the case of Villers v. Beaumont, which went beyond it, for in that case, a particular consideration was expressed, yet an averment and proof was made of another consideration, consistent with the consideration expressed. Where, indeed, a consideration is expressed, no other consideration, which is *contradictory* to it, can be proved ; whereof an example is given at the end of Bedell's case, 7 Rep. 39. b ; as, if a

two or more minds, and that the consideration was involved in this reciprocity between the parties, which reciprocity ought, therefore, to appear, or the *whole* agreement could not appear; that the consideration, in a word, was an integral part of the contract, and not lying in averment or parol testimony.

*[120] The counsel for the plaintiff insisted that the consideration was a matter of fact, and among the *res geste*, by the averment and proof of which the instrument was not contradicted or varied, but affirmed and corroborated. To maintain their side of the question, it seemed incumbent upon *them to show, that the consideration of an agreement was no essential part of its constitution, but a matter connected with the act of contracting by an accessory and circumstantial relation. Which argument the court repelled by answering in substance as follows: viz. the terms of the agreement, it is allowed, ought to be in writing; if there was no consideration, the agreement was of no avail in law; if there was one, it was necessarily an ingredient in the terms of the agreement, since the true notion of a legal consideration is not a personal collateral inducement, by which a party is privately influenced, but a benefit or loss in the mutual understanding and contemplation of both the parties.

That the literal act of signing the name is not always necessary.

Third preliminary topic.—With respect to the signing, which is one of the constituents of a valid agreement, under the 4th and 17th sections of the statute, (and which is the third head of inquiry proposed at the beginning of this chapter to be treated of) it seems proper to observe in the first place, that the literal act of subscribing the name is not always judged necessary to satisfy the requisition of the statute in this particular. It is true, indeed, that in the case of *Bawdes v. Amhurst*,^(a) Lord Chancellor Cowper, after stating that he had always been tender of

(a) Prec. in Chan. 402.

father by deed indented, in consideration of 100*l.* paid by the son, covenants to stand seized for the use of the son; there no use shall be raised to the son, unless the deed be enrolled, according to the stat. 27 Hen. 8, c. 10. An attention to which distinction between evidence of a contradictory, and of a new or additional but *consistent* consideration reconciles and explains the case of *Clarkson v. Hanway*, 2 P. Wms. 203, which was nearly the same in circumstances with the example put in *Bedell's* case as above mentioned.

laying open that wise and just provision which the Parliament had made, declared that he knew no case where an agreement, though it were all written with the party's own hand, had been held sufficient, unless it had been likewise signed by the party, and that the party's not signing it, was an evidence that he did not think it complete, but had left it for an after consideration, and might afterwards make alterations or additions to it. The case, however, was not decided on the insufficiency of the signing, but on the imperfect state of the document which was offered as the agreement, and which consisted only of preparatory *heads for a settlement into which the proposals on each side had been digested by the solicitor. * [121]

But in *Welford v. Beazeley*, (b) Lord Hardwicke denied the general doctrine laid down in *Bawdes v. Amhurst*, though he agreed with the particular reason of the judgment; observing, that there had been cases where a letter written to a man's own agent, setting forth the terms of an agreement as concluded by him, had been deemed a signing within the statute. And it seems to have been his Lordship's clear opinion, as may be collected from this and other cases, that it is not necessary that the identical agreement should be signed, but that if the agreement or contract is acknowledged by a letter signed, the statute is satisfied. And this was the result of *Tawney v. Crowther*, (c) qualified, however, as I apprehend, by this distinction—that if the agreement itself is unsigned, the letter referring to it should demonstrate an intention to be bound by the agreement, according to the terms contained therein, or if any other terms are contained in the letter, such letter should be decided in its expression. (59) But the bare writing an agreement *with one's own hand*, is not of itself equivalent to a signing, according to Lord Macclesfield, in *Hawkins v. Holmes*, (d) who seems, however, to have entertained stricter sentiments on the general doctrine than appear to have been adopted in later cases.

Held by Lord Hardwicke not to be necessary that the identical agreement should be signed; but enough, if the contract is acknowledged by a letter signed.

(b) 3 Atk. 503. (c) 3 Bro. Ch. R. 318. (d) 1 P. Wms. 770.

(59) But if a letter is intended only to be carried into execution, by a more formal instrument, it seems there is no *locus penitentie*. Decrees have been founded, says the Master of the Rolls, in *Fowle v. Freeman*, 9 Vez. jun. 355, upon letters and proposals never intended at the time to be a complete, final agreement.

The place of the signature not essentially important.

If the name is inserted any where, it is sufficient, but then it must be inserted with a view to give authenticity to the whole instrument, and not as applicable to particular purposes.

* [122]

The place of the signature seems not to have been regarded as of much importance. If the name is inserted in any part of the instrument, it may operate as a signing, under the statute of frauds, but then it must have been inserted for "the clear and only purpose of giving authenticity to the instrument. This has been often held in respect to wills, as where a testator begins thus: "I, A. B. do make this my last will and testament," and omits to subscribe his name, the will is considered as sufficiently signed.^(c) And Lord Eldon, in the late case of *Coles v. Trecothick*,^(f) observed, that if such was a sufficient signature in a will devising *lands*, it was very difficult to say upon what ground such a signature should not constitute an effectual agreement as to *lands or goods*; which opinion his lordship had before intimated, when he sat as chief in the court of Common Pleas.^(g) That this would be virtually a signature, was thought by the barons in *Stokes v. Moore et Ux.* a case determined in Serjeant's Inn Hall, in 1786,^(h) who admitted, that if the name had been inserted in that case, with a view of giving authenticity to the whole instrument, it did not much signify in what part of the instrument it was found; and in the *vis prius* case of *Knight v. Crockford*,⁽ⁱ⁾ the same point was so ruled by Ch. J. Eyre.⁽⁶⁰⁾

† [123]

In *Stokes v. Moore*, above-mentioned, the defendant Moore was called upon by the defendant to name a person to prepare the lease. Moore named one S. for that purpose, and wrote certain instructions for the lease in the following words: "The lease repewed—Mr. Stokes to pay the King's tax, and also to

(c) 3 Lev. 1. *Levayne v. Stanley*, 3 Lev. 86. *Hilton v. King*, and see *Vin. tit. Dev. (N. 7.)* (f) 9 Vez. jun. 249. (g) 2 Bos. et Pull. 238. *Saunderson v. Jackson*. (h) 1 P. Wms. edit. Cox, 770, n. (i) 1 Esp. Ni. Pr. Ca. 190.

(60) Nor does it make any difference, if the party who has thus formally written his own agreement, beginning it with, "I A. B. &c." leave a place at the bottom for his signature, and neglect to subscribe his name; and yet in such a case, as was observed by Lord Eldon, in *Saunderson v. Jackson*,* it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. And see the same point in *Fowle v. Freeman*, 9 Vez. 351.

* 2 Bos. et Pull. 238.

pay Moore 24*l.* a-year, half-yearly—Mr. Stokes to keep the house in good tenantable repair," &c. And the question was, whether there was a sufficient signature, as Moore had written his own name in the body of the instrument. The barons dismissed the bill, and one of the grounds for the dismissal was, that it could not be imagined that a name inserted in the body of an instrument, *and applicable to particular purposes*, could amount to such an authentication as the statute required.

It is, therefore, on such questions to be considered, what the object of the instrument is; for the insertion of the name must be always governed thereby; it must also appear that the writer had the whole object of the instrument in prospect, when he wrote his name, and that the instrument, or writing, was completed by one simultaneous act.

It is upon the above principles that Lord Hardwicke appears to have determined the case of *Welford v. Beazeley* (†) in which it was held by him, that the signing as a witness was a sufficient signing within the statute, so as to affect the testator with a liability under the agreement, as far as the contents thereof depended upon *his* acts for their effect; provided, that at the time of attesting, he was well acquainted with the contents; which knowledge of the contents is a matter of fact, proveable by parol evidence. (61) It was observed by the present Chancellor, in commenting upon this case, that although it is true, that where a party, or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as a principal; yet that the decision in *Welford v. Beazeley* went upon the assumption of the fact, that the intention of the party there "was not to sign the instrument as an agreement, that was to be binding upon her. The truth is, she was not named as a party to the instrument, but it specified certain acts, which it concerned her, and her only, to perform, and her signing as a witness, with a perfect acquaintance with the contents, had the effect of acknowledging and adopting the agreement; and by

The signing as a witness, with a knowledge of the contents, a sufficient signing within the statute.

* [124]

(†) 1 *Vez.* 6. 1 *Wils.* 118. *S. C.*

(61) See the civil law doctrine on this head, in *Menochius de Præsumptionibus*, lib. 3, præs. 66, num. 24, et seq.

Held sufficient as against the party charged, if the instrument is only signed by him.

the language used in that case, by Lord Hardwicke, we perceive clearly, that it was upon this more *general* principle, that he meant to ground his decision of the case.

According to Mr. Maddox, in arguing the case of *Whitchurch v. Bevis*,^(l) it seems formerly to have been thought necessary that both parties must sign an agreement, or it would be binding upon neither in equity. But to show that the doctrine in this respect had been changed, that learned gentleman cited a case of *Cotton v. Lee*, which was decided before the Lords Commissioners in 1770, wherein it was held sufficient, if only the party to be charged had signed; and he observed, that the same had also been determined in the Exchequer.⁽⁶¹⁾

There may be cases too, as it is conceived, in which the signature of one of the parties may be binding upon both; as where a bill is filed for a specific performance of an agreement, signed only by the defendant, the plaintiff acquiesces by his application for relief, in all the terms of the instrument which are required to be performed by him.^(m)

It seems a printed name may be a sufficient signature.

* [125]

It appears, according to the Chief Justice in *Saunderson v. Jackson*,⁽ⁿ⁾ that where a man has been in the habit of printing instead of writing his name, he may be said to sign by his printed name; and on this ground, a tradesman's bill of "parcels, in which the vendor's name was printed, was there deemed to be, though not the contract itself, yet a sufficient *nate* or *memorandum*, in writing, of the contract signed by the party. It is to be observed, however, that in the case last-mentioned, the judgment did not rest upon that point alone, as there was a subsequent letter, written by the vendor to the purchaser, acknowledging the sale, and which was judged capable of operating, together with the bill of parcels, so as to make out in conjunction an undoubted compliance with the 17th section of the statute of frauds. And this last-mentioned case is an illustration of some of the principles above stated, particularly that, if by writing his name, the party does not mean to sign the contract, yet if he

(l) 2 Bro. Ch. Ca. 564. (m) *Owens v. Davies*, 1 Vez. 82. (n) 2 Bos. et Pull. 238.

(61) The same point was so decided in the case of *Matton v. Grey*, about 7 years after the making of the statute, 2 Ch. Ca. 164.

means to acknowledge or admit its authenticity, it is a sufficient signing to fulfil the intention of the statute.

PART II.

On the Fourth Clause of the Fourth Section, respecting Contracts, or Sales of Lands, &c.

AS it has been thought proper in this treatise not to prosecute the consideration of the sections in the order in which they occur in the Act; but in an order more suited to the connexion between the subjects themselves; so, in treating of those sections which are split into distinct objects, the same privilege will be used in handling them in a succession more agreeable to the natural procedure from generals to particulars, and best calculated to save repetition. In pursuance of this method, the 4th clause of the 4th section, which makes writing essential to a contract or sale of lands, hath been taken first into consideration; in respect to which some *general* questions first offer themselves.

*The statute declares that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto properly authorised."— In which clause we are first naturally led to consider the words which describe the *subject matter* of the contract. By which words the operation of the clause is clearly confined to real property, or an interest out of or relating thereto. And it seems, that a thing annexed to the land, if contemplated as severed therefrom, and so converted, in the view of the parties, into a substantive chattel, is not within this provision. A chattel, indeed, which is only affixed to the freehold, has evidently but an accidental connexion with it; and if *growing* timber or grass be the subject of the contract, though they accompany the estate in the freehold until they are disannexed, or severed, yet when sold in prospect of such separation, it is in the contemplation of the parties a bare chattel; and I conceive that as to this point,

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Things annexed to, or growing upon the freehold, may be regarded as chattels, if treated for in prospect of their separation.

though not on some other questions, (62) it is a matter of indifference whether the subject grows spontaneously, or is planted and cultivated by the hand of man. (o)

Of the extension of the words used in this clause to express the subjects of its application.

But when things affixed to or passing with the freehold are sold *with* the land, they clearly fall within the 4th section of the statute. It need scarcely be added, that all freehold rents, of whatever denomination, are within the operation of this clause; the words of which are—"upon any contract or sale of lands, tenements, or hereditaments, or *any interest in or concerning them*;" and even if the words in italics had been wanting, the word *tenements* would have included *rents*, as it has been held to do under the section respecting the attestation *of wills*. (h) A share of

* [127] - the new River, (g) is clearly enough a species of property affected by this clause, and I presume it can as little be doubted, that it extends also to shares in canal navigations, and, in general, to all descriptions of tolls. The word '*tenements*,' indeed, has in law so extensive an import, that it may be questioned whether the superadded words in this clause of the statute has enlarged the operation of the statute. It was the only word which the statute of Westminster 2, or 13 Ed. 1, cap. 1, *de donis conditionabilibus*, used in expressing the subjects of its provisions. And Lord Coke, in speaking of the statute *de donis*, observes, that the word tenement therein includes not only all corporate inheritances, which are or may be *holden*, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exerciseable within the same, though they lie not in tenure; as rents, estovers, commons, or other profits whatsoever, granted out of lands, or uses, offices, or dignities, which concern lands or certain places, and these may all be entailed within the statute, because they savour of the realty. Such things too, whereof a wife is dowable, as the profits of a stallage, market, or fair, a dove-house, or piscary, which have no connexion with the soil, as also a presentation to an advowson, tithes, the profits of courts, fines, and heriots, seem all to be included within the compass of this clause of the statute.

(o) 1 Lord Raymond, 182, per Treby, Ch. J. and see 1 Bos. et Pull. 397, Poulter v. Killengbeck. (p) 2 Vez. jun. 232. (q) 2 P. Wms. 127, Drybutter v. Bartholomew.

(62) As on a question of title to emblements.

The three general questions treated of in the first part of this chapter, have anticipated a great deal of observation on this particular clause of the 4th section ;(63) and little else *seems to remain for me, on this subject, but to review the cases of part performance, which have tended so much in †courts of equity to circumscribe the operation of the statute, and those wherein the much agitated question occurs, concerning the pleadings and jurisdiction of these courts, as coercing the consciences of the parties, in respect to the confession and discovery of the agreement.

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(63) The introductory chapter on the general question as to the admissibility of parol evidence, and that which succeeded on the doctrine of declared and implied trusts, have also greatly alleviated the pressure of this present part of my subject. All implied trusts, we have seen, are above the controul of the statute, and wherever the implication of a trust appears to the courts of equity as necessary to defeat the contrivances of fraud, whether the subject matter of the deceit be real or personal estate, the impediments of the statute are made to give way to the paramount exigency of substantial justice. We may observe, too, in general, that the courts of equity, in the construction and application of the statute, have always been tenacious of matters of jurisdiction ; the statute itself having given an example of the regard of the legislature to the constitution of these courts, in the exception which it has made of implied trusts, by the 8th section. On the same principle, all equitable liens are out of the statute ; and thus a deposit, for the performance of a written agreement, though there be no writing by which such deposit is declared to be a security, is not within the purview of the statute, as was held in the case of *Hales v. Vanderchem*.* And according to the doctrine of the court of Chancery, a deposit of deeds entitles the holder to have his security perfected by a regular assignment, conveyance, or sale. Thus, in *Russel v. Russel*,† where a lease had been pledged by a person, who afterwards became a bankrupt, to the plaintiff as a security for a sum of money borrowed, and the holder brought his bill for the sale of the leasehold estate, though it was insisted by the counsel, that the plaintiff's claim was opposed by the 4th section of the statute of frauds, as an attempt to charge land without writing, yet an issue was directed by the Lords Commissioners, to try with what intention the lease had been delivered ; and Lord Loughborough seemed to treat the contract as already executed in equitable contemplation, and not as a thing to be performed, observing, that the court had nothing to do but to supply the legal formalities. Upon the

Equitable
liens and de-
posits are out
of the sta-
tute.

* 2 Vin. 717.

† 1 Bro. C. R. 269.

Of the particular relief of courts of equity in cases of fraud, by decrees of injunction and specific performance.

The specific relief which it falls within the jurisdiction of a court of equity to afford in cases of fraud, is not less the occasion of sending the majority of those cases to that forum, than its particular authority to compel, upon oath, a discovery of latent facts. Fraud, in all its shapes, is alike obnoxious to the remedies of courts of equity and law, (64) but the difference in the extent of the relief afforded by them, consists in this, that the common law judicature can only proceed negatively against it, by avoiding and annulling every act and deed into which it enters, as against the culpable party; but equity goes further, where it is necessary, and will compel a party to do a positive and specific act, where the fraud consists in omission, and the exigency of retributive justice cannot otherwise be substantially satisfied. Thus there is an unceasing call for its interference, in compelling what is technically denominated specific performance; to which extraordinary and beneficial remedy, we may add that correlative branch of its peculiar jurisdiction, which is exercised in putting a sudden and salutary stop to acts and proceedings, injurious or unconscientious, by decree of injunction.

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Of the relief of those courts against fraudulent suggestions, and fraudulent suppressions.

* There is a *positive* fraud in attempting to profit by the mistakes of a person, which are the consequence of our own misrepresentation, or of the false expectation raised in his mind by our own illusory behaviour; and there is a *negative* fraud in imposing

trial, the jury found that the lease was deposited as a security; and the cause afterwards coming on upon the equity reserved, before Lord Chancellor Thurlow, the court ordered the lease to be sold, and the plaintiff to be paid his money.* The same point was, it seems, determined in the cases of *Featherstone v. Fenwick*, and *Hereford v. Carpenter*, where the same Chancellor determined that the deposit of deeds entitled the holder to have a mortgage to effectuate his lien, although there was no agreement in writing to assign; the deposit affording a presumption of intention to that effect.

(64) It was observed by Buller J. in *Brodie v. St. Paul*, 1 Ves. jun. 333, that there can be but one construction upon the statute of frauds. Whatever it is, it ought to hold equally in courts of law and equity; and that as it is settled in equity, that a part-performance takes it out of the statute, the same rule shall hold at law. But observe the remarks of the present Chancellor, Lord Eldon, on this passage of Mr. J. Buller's opinion, in the late case of *Cootte v. Jackson*, 6 Ves. jun. 39.

* See Addenda XIII. prefixed to 2d vol. of Bro. C. B.

a false apprehension on another by our silence, where silence is treacherously expressive. In equity, therefore, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking, when conscience requires him to be silent.⁽⁶⁵⁾ Thus, in the case of *Raw v. Potts*,^(r) affirmed in the House of Lords, where A being tenant in tail, with remainder to B in tail, and not knowing of the remainder over, made a settlement upon his wife for life, by way of jointure, which B, who knew of the entail, engrossed, B, after the death of A, recovered at law against the widow by ejectment, but the widow was relieved in chancery by perpetual injunction. And thus is a case where a mother, who was absolute owner of a term, (the same having been limited to her in tail) having been present at a treaty for her son's marriage, and having heard him declare that the term was to come to him at his mother's death, had attested the deed, whereby the reversion of the term was settled upon the issue of the marriage, she was compelled in equity to make good the settlement.

The same principle of relief has always opposed the application of the provisions of the statute of frauds, whenever they have been attempted to be made use of for the purposes or protection of fraud.^(s) It is said, that the first case of this sort of relief occurred in the time of Lord Nottingham, where, there being an absolute conveyance executed, and a defeasance prepared, according to agreement, but not executed, the defendant being called upon to execute it, refused, relying upon the statute; but he was overruled, and compelled to execute it in equity.^(t) The next step in the progress of this equitable opposition to the abuse of the statute is said to have been made in the time of Lord Jefferys, by whom it was adjudged, that putting the party in possession, was such an execution of the agreement, as that it should be considered as good against a subsequent purchaser. So where A stands by, says the same book, and sees a party lay out his money in building on his (A's) ground, he (A) will be bound

Of the application of this principle of relief to the cases arising upon the statute, where it is attempted to be made a protection of fraud.

* [131]

(r) Pres. in Ch. 35.
ment, 423.

(s) 5 Vin. Abr. tit. Contract and Agree-
(t) Ibid.

(65) See (if the egotism may be pardoned) my book upon Fraudulent Conveyances, 539.

thereby. The bill, as it seems, in the case alluded to, in the time of Lord Jefferys, was brought to compel the defendant to make a lease according to his promise, the plaintiff having laid out money on the premises ; the defendant insisted upon the statute, there having been no agreement in writing, nor any certain terms settled between them ; and alleged, that what the plaintiff had laid out was not on lasting improvements ; but admitted, that he had built a stable, which had cost him about 10*l*. It was proved, that the defendant had told the plaintiff, that his word was as good as his bond, and promised him a lease, when he should have renewed his own with his landlord. The Lord Chancellor said, that the defendant had been guilty of a fraud, and ought to be punished for it, and decreed a lease to the plaintiff, though the terms were uncertain ; and adjudged, that the time for which he should hold the premises, should be in the plaintiff's election, and that he might choose to hold during the defendant's term, at the old rent ; and the plaintiff was decreed to pay costs.

That the relief against the statute in the cases of part-performance was originally founded on fraud.

It is very clear that the relief against the statute in these cases, of part-performance, was originally founded on the fraud and deceit usually characterising the circumstances, and arose naturally and necessarily out of the jurisdiction of the court. The present Lord Chancellor of Ireland,^(u) when at the bar, observed, in arguing for the defendant, in *Whitbread v. Brockhurst*,^(x) that courts of equity had, in some cases, decreed a specific performance of parol agreements, but *that the *only* ground upon which they had so decreed was fraud. "The first case," continued he, "was before Lord Nottingham.^(y) It was an agreement for an absolute conveyance and a defeasance ; the conveyance being executed, the other party refused to execute the defeasance. There one thing was obtained, where another was intended, and that being a species of fraud, the court relieved. Some other cases followed upon the same ground ; among the rest, Sir George Maxwell's case.^(z) So, where the execution of the agreement is prevented by fraud, as was the case in *Foxcraft v. Lister*.^(a) That was followed by several cases, all of the same nature, disclosing some

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(u) Lord Redesdale. (x) 1 Bro. C. R. 408. (y) Vide supra ; and see the same point stated in Prec. in Ch. 526. See also 2 Atk. 99, 3 Atk. 389. (z) Prec in Ch. 526. But see the same case more fully stated in 1 P. Wms. 618. (a) 2 Vern. 456.

circumstance that makes the refusal to execute the agreement fraudulent."

There does not seem, indeed, to be any satisfactory foundation for this doctrine of part-performance, without the intermixture of fraud; and upon this ground, where an owner has encouraged another to go on with his improvements on the estate under a false expectation of a conveyance or lease, raised in him by the assurance of the party entitled, it is agreeable to the general course of equitable relief to disappoint the contrivance, by compelling the deceiver to realize the expectation he has created. This protecting jurisdiction has indeed stretched itself to those cases where the illusory hope has been raised, not by words and assurances, but simply by looking on in silence, while false impressions, which we are able either to correct or verify, are inducing a fruitless expenditure on improvements. This equity is strong and salutary; and the jealousy of jurisdiction has shut out the statute of frauds, where this principle of relief applies. Some cases to illustrate this doctrine were produced a little above, to which we may add the instance of *Hanning v. Ferrers*, reported in the *Abridgement of Equity Cases, (b) from which it appears, that if J. S. encourage a person to take a long lease from a tenant for life, to whom J. S. stands next in remainder, and to build and make improvements, and the tenant for life dies before the lease is out, chancery will not suffer the lessee to be turned out of possession before the lease is expired.

Whether, in the first instance, it was reasonable and beneficial to make fraud a ground for letting in evidence to prove a particular agreement in terms, so as to execute it in the teeth of the statute, it would now be of little service to inquire, as I conceive there is hardly any rule of equity more established on authorities.

To the common observation, that the statute was made to prevent and not to assist fraud, one is tempted, however, to oppose the remark, that, if the law lays down certain conditions, upon which it stipulates to afford its protection and assistance, in a particular case, (conditions calculated, as we ought to presume, to render its protection and assistance more generally effectual) an individual neglecting to entitle himself to the benefit thereof,

That the fraud in encouraging another to make improvements on an estate, under the expectation of a lease or conveyance, was an early ground of relief.

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Even this ground for relieving against the statute by compelling specific performance, may perhaps be open to criticism.

But the doctrine is now established on a perfectly intelligible principle.

and chusing rather to put himself upon the honour of the party, seems to have no right to complain of the consequences of a risk, to the peril of which he has voluntarily submitted. On the other hand, the public may have a better right to complain, if, by the variable application of a law, useful only as long as it is uniform, men are encouraged to hazard the consequence of neglecting it.

Observations of the late Lord Alvanley on this subject.

On this subject, the late Lord Alvanley, when Master of the Rolls, expressed himself in terms which cannot fail of making much impression.(c) "I admit, said his lordship, my opinion is, that the court has gone rather too far in permitting part-performance and other circumstances to take cases out of the statute, and then, unavoidably perhaps, after *establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of *some* agreement; but of what must be left to parol evidence. I always thought the court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation: these cases are very unsatisfactory. It was very right to say the statute shall not be an engine of fraud; therefore, compensation would have been very proper. They have, however, gone further, saying, it was clear there was some agreement, and letting them prove it. But how does the circumstance of a man's having laid out a great deal of money prove that he is to have a lease for 99 years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case."

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But these instances of encouragement, either tacit or express, to make improvements,(66) incur expense, or exercise acts of

(c) 3 Vez. jun. 713, *Forster v. Hale*.

(66) In *Hollis v. Whiting*, 1 Vern. 151, the bill sought to compel the execution of a parol agreement for a lease of a house, setting forth, that in confidence of this agreement, the plaintiff had laid out and expended considerable sums of money. The defendant pleaded the statute of frauds, and the plea was allowed. And again, in *Dean v. Bard*, and *Hollis v. Edwards*, 1 Vern. 159, on which cases bills were exhibited, to have an execution of parol agreements, touching leases of houses, stating, that in confidence of these agreements, the plaintiffs had expended great sums of money on the premises, the Lord Keeper

dominion, which must turn to the prejudice of *the mistaking party, if his expectation is disappointed, are not proper cases of part-performance. but of actual fraud, which courts of equity have always been forward to relieve against. Such injustice is held in equity to impose upon the conscience the duty of reparation, and the court will supply an agreement out of the fraudulent suppressions, as well as misrepresentations of the party deceiving, who is considered as virtually agreeing to make good the expectation he has raised. Thus, if I persuade another to act upon a confidence that I can make him a grant, or give him an interest which, at the time of such promise made, is out of my power, and afterwards, by an unforeseen accident, I am enabled to do the thing promised, a court of equity will compel me to the performance.

But still it seems hardly reconcilable with sense to call improvements made upon the faith of a parol agreement, for granting an estate or interest in the land, a part-performance, unless it is supposed, that to make such improvements was an article of the agreement itself; for it is the doctrine of part-performance, that the acts done must appear to be done with a view to perform the agreement.(d)

Distinction between the cases where there is an ingredient of fraud, and where there is merely the part-performance,

Where the transaction is itself fraudulent, the courts will go very far in presuming any thing to prevent its success, and parol evidence of an agreement, assisted by this presumption, is let in for this purpose. The courts do not, in such case, execute the agreement for the sake of the agreement, but they at once presume it, and enforce it, for the sake of disconcerting the fraud. But in the case of mere part-performance, the fraud they go upon is the unconscientiously insisting upon the statute: The very notion, therefore, of part-performance, supposes the fact of an antecedent agreement to be established, and has reference there-

(d) Ambler, 586, Gunter v. Halsey.

took a difference (not a very intelligible one, if fraud was the question) between the cases where the money was laid out in necessary repairs and lasting improvements, and where it was laid out for fancy and humour. He thought, however, the bills would hold so far as to entitle the plaintiffs to a return of the consideration. Probably, in these cases, which are very short and unsatisfactory, there was no ground for imputing actual fraud.

*[136]
That the equitable doctrine of part-performance as applied to the statute, proceeds in a circulating course of reasoning.

to. It *assumes* the existence of the agreement, since, as has been before said, the acts must appear to have been done with a direct view to perform *a particular agreement, and thus, by a circulating process of reasoning, they *prove* and are *proved from* the agreement at the same time. To call any thing a part-performance, before the existence of the thing, whereof it is said to be the part-performance, is established, is an anticipation of proof by assumption, and gets rid of the statute by jumping over it; for the statute requires proof, and prescribes the medium of proof. But to frustrate its caution, we take for granted a fact, which we then set about proving, by a description of evidence, which we say takes the case out of the statute, as it tends to establish the agreement without the danger of fraud or perjury. The agreement is the thing to be proved, or the conclusion, but by an inverted syllogism, we take the conclusion for our premises, to avoid encountering at the threshold the direct resistance of the statute.

It is easy to see that this is a very different mode of procedure from that which the courts are to be regarded as pursuing in the case of fraudulent suppression or representation, where there is a substantive ground, and a consistent principle of relief, upon which the wrong is redressed, by forcing the party deceiving to make such reparation as he is competent to make, and by shaping a constructive or presumed agreement to the attainment of that object. In cases of that sort, the relief is granted as a consequence of jurisdiction, which the legislature will not be supposed to have intended to invade.

That those cases are regarded as out of the statute where agreements are prevented from being reduced into writing by fraud.

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The principle of this relief distinguished from that which prevails in

Upon the same principle of relief, those cases have been regarded as being out of the statute, where agreements intended to be reduced to writing have been prevented from being so reduced by fraud: for, in such cases, the fraud arises out of a *distinct* transaction, and, being once established, every thing is to be presumed against it; and an agreement shall be presumed such as in conscience ought to be understood as virtually implied in the transaction: the proof sets out without involving any reference to an existing positive agreement. *But when cases of simple part-performance are said to be founded on fraud, the fraud *there* supposed is not understood to arise out of any *distinct previous* transaction, but to be committed by and to consist in the act of insisting upon the statute; a doctrine which depends upon

that circulating logic above adverted to : for, if the resistance under the statute constitutes the fraud, it must do so by a reference to a supposed agreement, the terms of which must be considered as established before the court has any foundation for its relief (67)

the case of simple part-performance.

Where the fraud has been considered as committed by the very resistance under the statute, the agreement is first taken as proof of the fraud, and then the fraud is held to take the agreement out of the statute as to the method of proof, or, in other words, to let in parol evidence of what is assumed as established, before the evidence can be justified or applied. It is true, an unconscientious use may be made of the statute, but this is such a fraud as it was in the power of the party deceived to have prevented by a compliance with the statute ; and he seems to have no reasonable ground to complain of the consequences of his voluntary neglect. Upon the whole, the courts have good reason to regret their own habit of temporising with a law, which, if uniformly enforced, was calculated to prevent perjury and deceit in the transactions to which its provisions extended, by the peremptory prescription of a method of proof, well adapted to disconcert the fraudulent, by imposing a test both upon the honest and the designing, unembarrassing to the one, but frequently fatal to the schemes of the other.

*But in deciding these cases of part-performance, the courts have sometimes, and more especially the late authorities, disclaimed the doctrine of admitting it simply as a proof of the existence of the agreement, to the effect of dispensing with the necessity of the proof required by the statute, viz. a writing signed. They have placed their decisions wholly on the ground of fraud—fraud in resisting the completion of an agreement partly performed ; with what consistency of principle may be a subject of speculative inquiry, but the doctrine is settled upon the basis, both of approving and reluctant authorities. But the reason on which this relief is professedly founded, viz. the fraud in seeking

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That the doctrine of part-performance is settled upon a series of authorities, but with some qualifications.

That the acts of part-performance must be in prejudice of the party performing them.

(67) Where there is a written agreement wanting only the signature of the parties, this effect given to part-performance, stands on a principle of much greater consistency ; for, in such case, the terms are ascertained, and there is an object of reference for the part-execution to be construed by.

shelter under the statute, from the obligation to complete a contract partly executed, seems to require that the party calling for such completion, should be the one who has executed the part-performance, and that the nature of the part-performance should be such as to produce a manifest prejudice to the acting party, unless the agreement be fulfilled on the other side. Thus, in the recent case of *Buckmaster v. Harrop*,^(e) before the present Master of the Rolls,^(f) where a part of the price had been paid by the vendee, and the vendor had received no prejudice, it was held that the ingredient of fraud was wanting as to the vendor, who, therefore, could not compel the execution of the contract by the vendee on the ground of his own acts. "If, said his Honour, the vendee had been let into possession, that would have been an act by which he might have had a prejudice. He added, that he was aware that there were cases wherein acts done by the defendant, were made a ground for compelling him to perform the agreement; but that it was difficult to bring those cases to bear: for to what do such acts amount, when there is no prejudice to the plaintiff? Only to proof of the *existence* of an agreement. The existence of the agreement may be put out of all doubt by the acts; but the objection upon the statute, that the agreement is not in writing, remains where it did. The court does not profess to *execute a parol agreement merely because it is satisfactorily proved. His Honour then cited the case of *Whaley v. Bagenal*,^(g) which being before the House of Lords, must supersede the authority of every other case, in which various acts had been done, implying that the party had sold the estate, and did not consider himself any longer as the owner of it. But it was held, that the acts done did not entitle the plaintiff to have the contract specifically performed."

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In the case of *Whaley v. Bagenal*, the application for a specific execution of the contract was made by the party by whom the acts were not done, against the party performing them, and was cited by the Master of the Rolls to prove the principle upon which the case of *Buckmaster v. Harrop*, was decided by him, *i. e.* that the court will compel a specific performance of a contract, not in writing, in behalf only of the person by whom the acts of part-performance were done, and who may thereby receive a prejudice if the whole is not performed; and not on be-

(e) 7 Vez. jun. 341.

(f) Sir Wm. Grant.

(g) 6 Bro. P. C. 45.

half of the other party, who seeks to avail himself of such acts of part-performance only for the purpose of evidencing the contract. But it may be questioned, whether the case of *Whaley v. Bagenal*, affords to this particular doctrine any confirmation; for the acts done by the vendor in that case, do not, according to the best authorities, seem to have been such as would have amounted to a part-performance, so as to have entitled even *the party performing them* to the assistance of the court, in compelling the completion of the purchase by the vendee. He delivered to the vendee his rent roll, altered and dated by himself in his own hand writing. He also delivered his title deeds to the vendee's agent, to be compared with the rent roll; and laid an abstract of his title and case thereupon before counsel, in which it was stated, that the vendee had agreed with him for the purchase of these lands, at 21 years' purchase. He likewise gave to the vendee a list of the debts which affected the estate, and authorised him to apply to the creditors; to several of whom, and to other persons, he was charged by the bill to have written letters himself, informing them that he had agreed to sell the estate to the plaintiff, at 21 years' purchase. The tenants were sent by him to treat with the plaintiff as owner of the estate, for renewal of leases, and for liberty to cut down timber. And with a view to prevent the effect of an elegit against himself, he produced evidence before a jury, that such agreement and purchase had been made. These were acts by which the party doing them might have received some prejudice, but it may be doubted whether they could be considered as in any degree an execution of the contract; they were *evidence* of a contract, but not *such* evidence, as the statute requires. The House of Lords, therefore, would probably have given the same judgment of dismissal if the bill had been filed, and the appeal made by the party himself, by whom those acts were done. For it seems that the true doctrine is, that the acts to be such as will constitute a part-performance, *i. e.* must appear to be done with a direct view to perform the agreement, and tend inceptively towards its accomplishment, (68) and must *also* be in prejudice of the party performing them. (h)

Preparatory and ancillary acts are not acts of part-performance.

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But that the acts must appear to be done with a direct view to performance of the agreement. *Et vide note infra.*

(h) See the same doctrine in *Gunter v. Halsey*, AmbL 586.

(68) In *Lacon v. Mertins*, 3 Atk. 4, it was agreed by Lord Hardwicke, that the act of part-performance must be such an act done, as

*By the abovementioned case of *Buckmaster v. Harrop*, it seems to have been well settled, that before the heir can insist on performance of a contract for the purchase of land out of the personal assets, the agreement must appear to have been binding upon the parties contracting, so as to vest an equitable title in the ancestor before his death. As the case comprises some important points relating to this subject, a short statement of it will be useful to the purpose of explanation. Certain estates were offered for sale at an auction, in four distinct lots, and by distinct particulars. F was the best bidder ; and offered to pay the deposits, 10 per cent, and the auction duty to Wright, the auctioneer, who was also the vendor ; but W declined receiving either, alleging that it was late, and that he had several miles to travel : but he told F he would lay down the money, and would settle with him another time, to which F agreed ; and the auction duty was accordingly paid by W. By the conditions of sale, the purchaser was to have possession of lot 3 immediately, and of the other lots at Michaelmas next : paying the remainder of the purchase money, upon the execution of the conveyance, on or before the 29th of September. F soon afterwards paid W the amount of the auction duty ; and sold the crops of hay, grass, and oats then growing on the premises, comprised in lot 3, to B, who afterwards took possession of the premises. An abstract of the title was sent to the attornies of F, about the 15th of September,

it appears to the court would not have been done unless on account of the agreement. But this does not seem to be a sufficient agreement of the act of part-performance, which, according to the case of *Buckmaster v. Harrop*, considered at large in the text, and many other good authorities, ought to be a step towards the execution of the contract. According to which more correct understanding of the nature of an act of part-performance, the Master of the Rolls, in the last-mentioned case, would not allow the payment of the auction duty to be a part execution ; which, nevertheless, was an act fully answering to the terms of the description (which probably was not meant to comprise *all*, but only to denote *one of its requisites*) given in the above-mentioned case of *Lacon v. Mertins* ; for it certainly would not have been done unless on account of the agreement. Mr. Ambler's description of a proper act of part-performance, vide 2 Bro. C. R. 561, comes nearer to the present more correct notion of it. " It must be something done *as owner* of the estate, and which the party would not have done, had not he considered himself in that light."

who approved of the title ; but before any conveyance was made, or the 50*l.* or any rent became due, F died. The bill was filed by the heirs at law of F, against the executors, the residuary legatees, *and the vendor, praying a specific performance of the contract, and that the purchase-money might be paid out of the personal estate. The answers admitted the agreement : the vendor submitted to perform the contract, and the executor did not object : but the residuary legatee resisted the performance.

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For the plaintiffs three points were insisted upon, but the last only belongs to our present purpose. It was contended, that there was a clear part-performance, so as to take the case out of the statute. Part of the money was paid. Of lot 3, possession had been taken, and the produce sold, which acts must amount to part-performance ; and the contract being entire, the consequence of such part-performance must extend to *all* the lots. The terms were different, but all the lots were sold by and to the same persons ; and lastly, it was insisted, that the residuary legatee had no right to object to the performance of a contract, to which the testator himself had no objection. But the Master of the Rolls was of opinion, that the court could not speculate upon what the testator would or would not have done, but that the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform ; for that *that* alone could give the heir a right to call for the personal estate to be applied, or to the personal representative a right to call upon the heir to convey. The question, his honour said, must be the same whether a purchase or a sale was insisted on : was the ancestor himself bound ? was there such an agreement as converts the real estate into personal, or the personal estate into real ? He was of opinion that every objection might be taken upon either, which it would have been competent to the deceased to take, if he had resisted the execution in his life-time. The money paid upon the auction duty was, in the opinion of the Master of the Rolls, no circumstance of part-performance ; for the revenue laws ought never to be held to operate beyond their direct and immediate purpose, so as to affect the property and vary the rights of parties. Upon a sale by auction, so much was paid to the *vendor as part payment, and so much to the government as a tax. If the purcha-

Unless a contract existed at the death of the testator by which he was bound and which he could be compelled to perform, the heir can have no right upon such contract to call for the personal estate to be applied ; or the personal representative to call upon the heir to part with the estate.

Payment of the auction duty no part-performance.

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ser refused to pay the tax, his bidding was void: if he paid it, the consequence was, that his bidding had the same effect, as it would have had if no such law had been made, and no other effect. That, without which there would have been no contract, cannot be said to be in part-performance of the contract. The only contract with the vendor, and which he could enforce, was for the price: but supposing that the payment of the auction duty *could* be considered as part of the price; he did not see how that could bind the purchaser. In general, the party seeking the performance must show a performance on his side, as a reason for the interference of the court in his favour; for the ground upon which the court acts is fraud in refusing to perform after performance by the other party. The inquiry was, whether F, if so disposed, could have resisted the performance; for if he could, upon the principle before stated, the heir was not entitled to call for an application of the personal estate for that purpose. But his refusal, after paying part of his purchase money, would be no fraud upon the seller, but his *own* loss.

Though it is true that a contract is entire, and that consequently if it be void under the statute as to any part of it, the whole must fail; yet, where an estate is sold in distinct lots, altho' there is but one purchaser of the whole, the contract may be valid under the statute as to one lot, and void as to another, or there may be a part-performance as to one, and not as to the others.

With respect to lot 3, his honour was of opinion, that what had been done in respect to that lot, supposing it to amount to part-performance, as to the particular premises contained therein, could not affect any other lot; for the several lots were included in distinct articles of sale, and so were unconnected.— But as to that lot, he was of opinion, that there was no part-performance: for the bargain with B, to whom the crops were sold, was the mere act of the vendee. The vendor had no prejudice, and it therefore gave him no title to insist upon the completion of the purchase, against the statute, on the ground of part-performance. He, the vendor, had done nothing to entitle him to say the non-execution was a fraud upon him. If, indeed, he had let B into possession, that would have been an act by which he might have received a prejudice. B says he is now in possession, which cannot be taken to be before the death of F, and nothing that passed since could influence the question, the inquiry being, *whether at his death he could have been compelled to perform his agreement.

The bill in *Buckmaster v. Harrop* was, as we have seen, filed by the real against the personal representative to have a contract for a purchase by the deceased party carried into execution.—

The case of *Lacon v. Mertins*,⁽ⁱ⁾ the converse in circumstances, affords the same principle. The bill was brought against the heir at law by the administrator of the deceased, to compel a sale according to the parol agreement of the intestate, for the benefit of the *personal* estate, and there being a part-performance *on the side of the purchaser*, so as to bind the deceased party; the court granted its relief according to the prayer of the bill; for, as the contract was binding, the thing to be done was considered as done, and the property was already converted in contemplation of equity. And it is to be observed, that the act of part-performance in this case of *Lacon v. Mertins*, was simply payment of part of the purchase-money, which was certainly a decided step on the one side towards the execution of the contract, and prejudicial to the party if such contract be not performed. The same doctrine is distinctly set forth by the same Chancellor, by whom *Macon v. Mertins* was determined in the case of the *Attorney-General v. Day*,^(k) which came on a few years afterwards. 'There is no case, said his lordship, where the representative of the personal estate is entitled to claim the money arising by the sale of the lands as personal estate, except where one or the other of the contracting parties in the purchase is entitled to carry it into execution in a court of equity: for where the court holds it ought not to be executed, there is no conversion of the real into personal estate in the consideration of the court, upon which that right of the executor depends. For if not effectually converted into money, it must be considered according to its original nature as *real*, and the heir at law must have the benefit. Whether there is any such conversion, depends on there being an effectual agreement binding *on all (69) * [145] parties, so that under all the circumstances it ought to be carried into execution upon this general principle of equity—that what is

(i) 3 Atk. 1, Lord Hardwicke, Chancellor. (k) 1 Vez. 218.

(69) If it was binding on the deceased party, by reason of the part-performance on the side of the other contracting party, though the agreement was not in writing, it seems sufficient to convert the estate in equity, as between the real and personal representative; at least, such appears to be the doctrine of *Lacon v. Mertins*, and *Buckmaster v. Harrop*.

contracted, for valuable consideration, to be done, will by the court be considered as done ; and all the consequences will arise as if it had been so done, and as if a conveyance had been made of the land, at the time, to the vendee. The first point of inquiry in the case was, whether what passed in the life of the deceased party amounted to a binding agreement on him for the sale ; and this question, his lordship seemed to think, depended upon the sufficiency of the acts on the other side to amount to a part-performance.

Thus the cases of *Lacon v. Mertins*, and the *Attorney-General v. Day*, decided by Lord Chancellor Hardwicke, and the recent case of *Buckmaster v. Harrop*, are agreed on this nice and important doctrine : but the authority of Sir John Strange, in *Potter v. Potter*,⁽¹⁾ determined about two years after that of the *Attorney-General v. Day*, and while Lord Hardwicke was Chancellor, is not quite reconcilable with the opinions of Lord Hardwicke and the present Master of the Rolls on this subject. The great question in which case, on a bill filed by the devisee to have the testator's contract carried into execution, and the estate contracted for, conveyed to the uses in the will, was, whether the contract for the lands treated for in the testator's life-time, had at any, and what time, so far proceeded as to vest an *equitable* title in the testator, though no conveyance was executed of the *legal* estate. His Honour was of opinion, that the contract was so far carried into execution as to supply the want of writing. But it appears, that the only acts amounting to a part-performance, were done by the testator ; and the cases above considered, particularly that of *Buckmaster v. Harrop*, turn evidently upon the doctrine, that the testator ought to have been bound by acts of part-performance on the side of the *other* contracting party, for the estate to be converted, so as to transmit a title to the party claiming by representation under the contract, to call for a specific performance.

The Master of the Rolls in *Potter v. Potter*, seemed to think, that the acts of part-performance *done by the party himself*, bound him to the complete performance, and gave a title to the other party to come into equity for compelling the completion ; in which opinion he seems not to have been followed by the present

(1) 1 Vez. 437.

Master of the Rolls, who has chosen rather to found himself upon the authority of Lord Chancellor Hardwicke, in the cases of *Lacon v. Mertins*, and the *Attorney-General v. Day* (70)

*In the case of *Hollis v. Whiting* (m) the Lord Keeper (n) expressed an opinion, that if the plaintiff had laid in his bill that it was part of the agreement, that the same should be put into writing, it would alter the case, and might possibly require an answer, *i. e.* that the statute could not be pleaded alone. But Lord Thurlow, in the case of *Whitchurch v. Bevis* (o) observed upon this opinion of the Lord Keeper, "If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, I agree to it, otherwise I take Lord North's doctrine to be a single decision, and contradicted, though not expressly, yet by the current of opinions." This doctrine of the Lord Keeper seems to have been connected in principle with another peculiarity in his views of this clause of the statute of frauds. In a subsequent case (p) before him, he remarks, that the difficulty which arose on the act of parliament in that case was, that the

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Of the doctrine, that if it is part of the agreement itself, that the agreement shall be put into writing, the statute cannot be pleaded.

(m) 1 Vern. 151, and see *Leak v. Morrice*, 2 Ch. Cas. 135. (n) Lord Keeper North. (o) 2 Bro. C. R. 565. (p) *Hollis v. Edwards*, 1 Vern. 159; and see *Leak v. Morrice*, 2 Ch. Ca. 135.

(70) In perusing the cases of *Potter v. Potter*, and *Buckmaster v. Harrop*, cited in the text, the student should attend to the reasons which occasioned the difference of effect given to the admission of the agreement, which the answers to the bills on both those cases contained. In *Potter v. Potter*, there was a full admission by all the parties opposed in interest, which, at that time, according to the then prevailing doctrine on the subject, took a case out of the operation of the statute, notwithstanding the statute was insisted upon by the defendant; but in *Buckmaster v. Harrop*, the bill being filed by the heir at law against the executors, the residuary legatee, and the vendors, to have the purchase-money paid out of the personal estate; though the executor admitted the agreement, and the vendor submitted to perform it, yet the residuary legatee, who was the party most interested in opposing the bill, contested it, and undertook to show that the plaintiff had no right to call for a performance of the agreement; and whether he admitted the existence of the agreement or not, yet as he insisted upon the benefit of the statute, according to the present inclination of the courts, it should seem that the statute would protect him. With respect to the admission by the executor, he had no right to give away the personal estate from the residuary legatee.

act makes void the estate, but does not say the *agreement itself* shall be void. And, therefore, though the estate itself is void, yet, possibly, the agreement may subsist. So that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity. Which, as far as it is intelligible as to its terms, seems to savour rather of a scholastic refinement of reasoning, and to be best answered by the words themselves, by which the statute has declared its meaning.

How far possession delivered, taken, or kept, is a part-performance.

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It seems to be pretty well settled, that if possession of the premises sold is given by the vendor to the vendee, this is a sufficient part-performance, at least on the part of the vendor, *to entitle him to the assistance of equity to compel a completion of the contract by the purchaser, notwithstanding the omission to reduce the contract to writing.(71) Thus, in the Earl of Aylesford's case,(g) where there was a parol agreement for a lease of 21 years, upon which the lessee entered and enjoyed for six years, and then the Earl brought his bill to oblige the lessee to execute to him a counterpart for the residue of the term, and the lessee pleaded the statute of frauds and perjuries; the plea was overruled, it being considered that the agreement had been in part executed.(72)

(g) 2 Str. 783.

(71) It seems hardly necessary to observe, that the possession must be legally and rightfully obtained. *Hole v. White*, before Lord Camden, 1767, cited 1 Bro. C. R. 409.

Of the operation of the statute on copyholds.

(72) The case of *Borrett v. Gomeserra*, Bun. 94, is characterised by some positive acts of ownership superadded to the possession, as bringing in bricks, fishing in the ponds, &c. It is observable, however, that the subject of the parol agreement in that case was copyhold lands; and that the reporter subjoins a query, whether copyholds are included in the general words of an act, and cites *Heydon's case*, 3 Rep. 8, and *Hardress*, 432. But the rule laid down in *Heydon's case*, is only, that general words in an act of parliament do not extend to copyhold lands, where the tenure, service, interest in the land, or other thing in prejudice of the lord or of the custom of the manor is thereby altered. And, therefore, copyhold lands are not within the statute *de donis condition- alibus*; because then the donee would hold of the donor, and so the tenure would be altered; and upon the same reason it is held, that the statutes *Westm. 2. of elegit*: 27 H. 8, c. 10, of *uses*: 31 H. 8, and 32 H. 8, of partition to be made by writ *de partitione facienda*, 32 H. 8, c.

*On a similar ground in the case of *Pyke v. Williams*,^(r) possession having been delivered by the seller to the purchaser, who refused to complete his purchase, and to give a colour to his possession, procured an assignment of a mortgage which he antedated, the possession delivered was held to be an act of part-performance; and accordingly the Lord Keeper decreed Pyke to go on with his purchase. The same point stands also upon the authority of *Lockey v. Lockey*,^(s) and a variety of other cases; and the doctrine was recognised by the present Master of the Rolls,^(t) in the above mentioned case of *Buckmaster v. Harrop*,^(u) who there observes, that if the vendor had let the vendee's lessee into possession, *that* would have been an act by which he

(r) 2 Vern. 455. (s) Prec. in Chan. 518. (t) Sir William Grant.
(u) 7 Vez. jun. 347.

28, of leases for 21 years, &c. by tenant in tail, &c. do not extend to copyholds. And it seems, that upon the same principle, copyholds would not have been comprised within the statutes of bankrupts without special words; they are expressly mentioned in the statute of 13 Eliz. and the acts of King James being subsequent and additional acts, and confirmatory and explanatory of that act of Elizabeth, are to be construed as if the word copyholds had been contained in them. It may be observed, however, that the assignee of the commissioners pays his fine, and therefore query as to any prejudice to the lord. The true rule of distinction seems to be, that the general words lands, tenements, or hereditaments, where they occur in a statute, do *prima facie* include copyholds; and though, wherever such construction can be shown to interfere with the rights or interests of the lord, the statute may be checked in its operation on that ground, yet these words, in their natural compass, shall extend as well to copyholds as freeholds, unless proof can be adduced of interference thereby with the rights or interests of tenure.

The judgment in the case of the Duke of York v. Sir John Marsham, Bart. Hardress, 432, wherein copyholds were claimed as forfeited under the act of attainder, for the murder of King Charles the First, was very satisfactory, and we cannot but particularly admire the Chief Baron's answer to the objection to his fourth reason.

Trying the question by the above-mentioned criterion, copyholds fall properly within the 4th section of this statute, concerning the sale of lands, and the 7th section requiring declarations in trust to be in writing, see *Withers v. Withers*, Ambler, 152, but they are neither within the statute of wills, nor the sections of the statute of frauds which relate to devises of lands.

might have had a prejudice. The *doctrine laid down in *Seagood v. Meale*, is sometimes mentioned as a contrary authority.(73) The position in which case is this, "where a man, on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee. Besides, that the lessor shall not take advantage of his own fraud, to run away with the improvements made by another; but if no such expense had been incurred on the lessee's part, a bare promise of the lease, though accompanied with possession, is directly within the statute; as where a lessee, by parol, agreed to take a lease for a term of years certain, and continued in possession on the credit thereof, such agreement is nevertheless within the statute.(74) We observe that in the case put as above in *Seagood v. Meale*, the relief was sought by the person let into possession, who could not be said to have received any prejudice thereby if the agreement should not be performed, unless he had laid out money in the melioration of the premises; whereas, in the cases above cited, wherein such possession constituted the part-performance to ground the title to equitable relief, the party who had sold and delivered the possession, under the contract, to the purchaser, was the plaintiff in equity, and he was clearly in a predicament to receive a prejudice from the non-performance of the agreement, and so within the principle on which the doctrine of part-performance was placed by Lord Hardwicke, in *Gunter v. Halsey*, and *Lacon v. Mertins*, and by the present Master of the Rolls, in *Buckmaster v. Harrop*.(75) And it moreover appears *by the words '*continued in possession*,' used in the said case of *Seagood v. Meale*, that the lessee was already in possession un-

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(73) See the Editor's note in the last edition of *Strange, to the Earl of Aylesford's case*, 2 Str. 783.

(74) It was necessary, in citing this part of the case, a little to transpose the language, as it would otherwise have been scarcely intelligible.

(75) One general remark seems proper to be made on this part of the subject, viz. that the mere non-execution of a lease or conveyance, is not a circumstance of itself affording a presumption of the agreement's having been waived. As long as it exists, the equitable estate exists, and the enjoyment must be under it accordingly. See *Robson v. Collins*, 7 Vez. jun. 130.

der an expired lease, and held over on the expectation of a renewal or further grant : which state of facts affords a much weaker foundation for supporting an application to equity for specific performance, whether we consider the lessor or the lessee as the plaintiff. But if a house has been built or improvements made by such holder over, and especially if the landlord has received an increased rent, a ground is laid for specific performance notwithstanding the statute, at least, for inquiry into the circumstances : so that if a plaintiff state these facts in his bill, and refer them to a particular agreement, it is probable the plea of the statute will be ordered to stand for answer with liberty to except.

The bill in the case of *Wills v. Stradling*,^(x) stated the following case : The plaintiff was lessee of a farm for 7 years, at the rent of 34*l.* a year, under the defendant, the widow of the lessor, under whose will she was entitled to the premises during her widowhood. The lease being to expire in 1794, the plaintiff, in June 1793, having an inclination to make some improvements on the premises, which would be attended with a very considerable expense, applied for a new lease for the term of fourteen years. The defendant agreed to grant a new lease for that term, if she should live and continue a widow, at the rent of 36*l.* a year ; and immediately, or very shortly after the agreement, the plaintiff, upon the faith of the agreement, and in confidence that he should enjoy for the fourteen years, under the agreement, began to make improvements, and laid out a great deal of money on the premises. The plaintiff continued in possession after the expiration of the former lease, and paid the increased rent, for which the defendant gave him receipts. The bill prayed a specific performance, and the defendant pleaded the statute. The Lord Chancellor, after premising that he felt a very strong inclination to support the statute of frauds, and to give a party ^{*}the benefit of it, by way of plea, declared his persuasion, that it was proper in that case to call upon the defendant, to make an answer to one part of the bill. His Lordship observed, that three grounds were stated : possession by the plaintiff, which he refers to the agreement ; payment of an increased rent, which he also refers to the agreement ; and that considerable sums of money had been laid out upon the improvement of the farm. As to the first ground,

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(x) 3 Vez. jun. 378, and see *Mortimer v. Orchard*, 2 Vez. jun. 243.

the fact of the continuance in possession (which is all the plea can admit for *quo animo* he continued in possession, is not a subject of admission) would not weigh. The *delivery* of possession by a person having the possession to the person claiming under the agreement, is a strong and marked circumstance ;(76) but the mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute, or call for an answer. As to the money laid out, his Lordship stated himself to feel the distinction, pressed by the Solicitor General, very strongly ; that if it was part of the contract that money should be laid out, and one of the considerations of granting the lease, (the laying out of which must be then with the privity of the landlord) it was very strong to take it out of the statute. But the circumstance which he thought principally distinguished the case, was the payment of the additional rent. Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea ? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon *the defendant to say, whether it was merely accepted upon a holding from year to year, or any other ground. Upon this reasoning, his Lordship ordered the plea to stand for an answer with liberty to except.

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Payment of part of the purchase-money, how far a part-performance.

It appears to be well settled, that payment of money in part of the purchase is a part-performance to take a case out of the statute.(77) The doctrine was distinctly laid down by Lord

(76) That part of the foundation for relief which consists of the prejudice to the party, arising from his part-performance, seems to have been overlooked by the Chancellor in this case. Vide *supra*, the comments upon *Buckmaster v. Harrop*, 138, et seq.

Of the doubt as to the proper mode of proving the receipt of the money.

(77) In *Bac Abr.* 1 vol. 120, a doubt is suggested as to the proper mode of proving the receipt of the money. It is there said to be clear, " that if the defendant by his answer confess the receipt of the money for the purpose alleged in the bill, or if he deny the receipt, and it is proved on him by written evidence, as a letter under his hand, he shall be obliged specifically to perform the agreement, because he has carried part into execution. But, if he confess the receipt of the money,

Hardwicke, in *Lacon v. Mertins*.(y) and admitted by the same Chancellor, in *Owen v. Davies*.(z) There is, indeed, a case in the second volume of *Equity Cases Abridged*, (a) of a contrary tendency. A agreed with B to make him a lease for 21 years, rendering rent, and B paying to A 150*l.* fine. B paid 100*l.* in part to A's agent, with the privity of A, who thereupon ordered his agent to prepare a lease, but before it was executed, repented and refused. B exhibited his bill for a specific performance, but the court refused. *In the case of *Main v. Melbourn*,(b) the Lord Chancellor considered that case as ill determined. It certainly seems quite irreconcilable with the current of authorities.(c)

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A distinction, however, was taken in *Seagood v. Meale*,(d) between the payment of a material sum, and of mere earnest,

(y) 3 Atk 4. (z) 1 Vez. 82. (a) P. 46, Lord Pengall v. Ross. (b) 4 Vez. jun. 720. (c) *Dickenson v. Adams*, cited in *Main v. Melbourn*, 4 Vez. jun. 722. (d) *Prec. in Chan.* 561.

but says that he borrowed it from the plaintiff, and that he had it not in execution of their agreement, then he turns the proof of the agreement on the plaintiff, and he (the plaintiff) must prove the receipt of the money by the defendant, for the purpose mentioned in the bill, by force of some written agreement." But this appears to be strange doctrine; for the receipt of the money can be nothing more than evidence of a part-performance collateral to the contract; and if an act of part-performance must be proved in writing, what is meant by saying that part-performance takes a case out of the statute, if the act in which it consists must be evidenced according to the statute?

(78) The case of *Alsopp v. Patten*, 1 Vern. 472, where a pair of compasses given by the buyer, and accepted by the seller, to bind the bargain, was held a part execution, upon the strength of which the court ordered the defendant to answer, seems to have been rather eccentrically determined. The anonymous case in *Freeman*, 128, and *Voll v. Smith*, in the third volume of the Reports in Chancery, p. 16, are the same way, but they were both before the statute; and it is surprising to see them so often cited as authorities, in respect to a question arising upon the statute. According to the law of Rome, although if the earnest be paid in money, it goes in part of the price, it is still but *argumentum emptiois et venditionis contractæ*; it does not break in upon the integrality of the subject of the contract '*res integra manet*,' and either party may recede from the bargain—the purchaser with the loss of the earnest, the vendor with the restitution thereof, accompanied with the payment of an additional sum to the same amount. The *emptio et venditio* is a luminous title in the text of the imperial law.

which was there held to be of no importance in the case of an agreement touching lands and houses, and only of effect in contracts for goods, under the 17th section of the statute, and was not to be considered as standing upon the same principle as the payment of a substantial part of the consideration for the purchase. (78)

Of the distinction between payment of a material part of the purchase-money and the payment of money merely by way of earnest.

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This distinction has been recognised and confirmed in the late case of *Main v. Melbourn*, (c) before Lord Loughborough; in which case the defendant treated with the plaintiff for the purchase of a piece of ground allotted to the defendant under an inclosure act. The parties agreed for the price of 105*l.* and the plaintiff thereupon paid to the defendant the sum of 5*l.* 5*s.* in part of the said sum of 105*l.* The bill prayed a specific performance of the agreement, and the plea of the statute was put in. The Lord Chancellor said "it could not be disputed, that if part of the purchase-money be substantially paid, the case is taken out of the statute. That whether the five guineas in the case before him, were paid on the notion of binding the bargain, or on account of the purchase-money, they were certainly part of the 100 guineas. If half a crown had been paid, it could not be denied that it was part of the 100 guineas. He could not let the plaintiff put his own construction on the payment. The bill stated, that five guineas were paid, and that they were paid as part of the purchase-money. But, said his Lordship, that does not strike me to have been the nature of the transaction. The bill would have stated it the same way if five shillings had been paid. Allow the plea."

Before the reader withdraws his attention from this part of the subject, he cannot but remark, in adverting to what fell from the late Master of the Rolls, in *Foster v. Hale*, (f) that this is a species of part-performance, most obviously open to compensation and retribution, and which would not, therefore, be entitled to rank with examples of part-performance, if it were a necessary part of its definition, that it should consist of acts which could not be undone, according to the idea entertained of its nature and principle by some respectable opinions. But however desirable it might have been at first to adopt such a definition, and to found the relief upon the principle of compensation, rather than

(c) 4 *Vez. jun.* 720. (f) 3 *Vez. jun.* 713.

specific performance, certain it is the cases have not proceeded upon these views of the subject.

I hope to be excused, if I venture out of my province to offer, with great submission, a few remarks upon the pleadings in courts of equity, where the statute of frauds comes into question.

Some remarks on the pleadings in courts of equity, where the statute comes into question.

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If the identical agreement charged in the plaintiff's bill be admitted by the defendant, whether he submits to perform *it or not, yet if he do not insist upon the benefit of the statute, he will be taken to have renounced it, and the court will, in consequence, compel him to perform the agreement, as set forth in the bill. And if the bill *allege* a *written* agreement, a necessity will not thence arise for the *production* of a written agreement ; but evidence of a parol agreement will sustain the bill. It is always sufficient if the plaintiff proves the substance of his bill ; and the difference between a written and parol agreement consists only in the *mode* in which they are *evidenced*. The substance of the thing is the same, whether in writing or not ; and upon a similar ground, it is held sufficient at law, if the declaration allege the agreement *generally*, without saying whether it was in writing or not.

It appears also to be clearly understood, that if the party submits by his answer to perform the agreement, there is a total end to the statute : so that where, after an answer admitting the agreement and submitting to perform it, the bill was amended as to other circumstances, the defendant was not permitted to take advantage of the statute by his answer to the amended bill, and a specific performance was decreed.(g)

That a parol agreement, notwithstanding the statute of frauds, must, if discovered or confessed, be compelled to be performed, is a proposition which seems to justify the conclusion, that all the means which the jurisdiction of the court affords, of ascertaining the existence of the agreement, ought to be resorted to in every case ; for what is just to be effectuated when known, ought in a court of conscience to be compelled to be revealed.— Upon this reasoning, was framed the opinion, that the defendant

(g) *Spurrier v. Fitzgerald*, 6 Vez. jun. 548.

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could not set up the statute as a bar to a discovery, but was bound to confess or deny a mere parol agreement alleged in the bill, though not averred to be in part performed. To those who adopted this opinion, it appeared, that, as the statute was made to prevent fraud and perjury, and the danger of fraud or perjury was removed by the confession *of the party, and, furthermore, as the defendant ought to discover whatever was material to the justice of the plaintiff's case, a forcible appeal should be made to the conscience of the defendant, which, if successful, would render the statute inapplicable, and prevent it from being made the shelter of fraud instead of a protection against it—from becoming the bane instead of the antidote.

But the better reasoning seems to arrange itself on the other side. Where integrity is a victim to the statute, it suffers the consequence of its own neglect of the means thereby provided for its security against fraud, and of the rational maxim of law, *vigilantibus non dormientibus leges subveniunt*. The principles of law and government require, that particular hardship, and cases even of transient injustice, must be endured, rather than that the standing policy of general justice should be disturbed. A law composed with the design of obstructing the facilities of fraud, and removing the temptations to perjury, is baffled in its general policy by a subjection to rules of a fluctuating operation; and the anxiety to take cases out of the statute, is the source of the inconvenience which has been reproachfully imputed to the statute itself. If the party must confess or deny the agreement, such denial is either conclusive, or open to contradiction by evidence *aliunde*. If open to contradiction, those very opportunities to perjury which the legislature by that statute designed to prevent, is revived, and on every such occasion the statute is suspended by the court. If the denial is conclusive, then has the defendant a direct temptation to perjury, in his answer, because of the *certain* interest which he has in the denial.

From the distressing and unsatisfactory case of *Whitchurch v. Bevis*,^(h) in which the intellect of Lord Chancellor Thurlow, struggled ineffectually with the difficulties thrown upon him, by the multiplied precedents of departure from the statute, we collect,

(h) 2 Bro. C. R. 566.

that it was the inclination of his Lordship's judgment, that the true and only effect of the statute was to exclude evidence *aliunde*, from proving a verbal agreement denied by the defendant's answer. So also in the late case of *Cooth v. Jackson*,⁽ⁱ⁾ according to the reporter, it was said by Lord Eldon, that if the defendant denies that any parol agreement ever took place, a court of equity will not inquire into the truth of that denial, which observation I presume his Lordship meant only to apply to a case where the bill charges no acts of part-performance.

The question, therefore, is, whether a party is to be laid under this violent temptation to answer falsely upon his oath, or is he to be allowed, under the authority of a public law, unambiguously promulged, to resist the performance of an agreement which he does not pretend to deny. In *Rondeau v. Wyatt*,^(k) it was said by the late Lord Rosslyn, when sitting in the Common Pleas, that it was very bad reasoning to hold that there was no danger of perjury, when the defendant was made to confess the agreement; and that perjury was the only thing which the statute intended to prevent; for the calling upon a party to answer a parol agreement, was laying him under a great temptation to commit perjury. Nor was it, in his Lordship's opinion, the sole object of the statute to prevent perjury: another of its objects was to lay down a clear and positive rule, to determine when the contract of sale should be complete. Something direct and specific was ordered by it to be done, to show that the agreement was final⁽⁷⁹⁾ and that there might be no room for doubt or

(i) 6 Vez. jun. 39.

(k) 2 H. Blackst. 68.

(79) In *Whitchurch v. Bevis*, 2 Bro. C. R. 556, Lord Thurlow intimated that it was a matter of serious consideration *what sort* of a verbal agreement, notwithstanding the plea of the statute of frauds, may be sustained, as being confessed by the answer, so as that this court will carry it into execution. His Lordship said, he was prepared to say, that "if there be general instructions for an agreement, consisting of material circumstances, to be thereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus penitentiae*, he shall not be compelled to perform such an agreement as that, when he insists upon the statute of frauds." Though a statute admitted to be salutary in its policy and purposes, had imposed the necessity of sub-

hesitation. *This was, continued the Chief Justice, the intention of the statute in all contracts for sale, in order to prevent confusion and uncertainty in the transactions of mankind; and his Lordship concluded, with citing *Whaley v. Bagenal*,⁽¹⁾ in the House of Lords, as coinciding with his own determination.

It is said not to have ever been decided, that a defendant may not by his answer admit the agreement, and at the same time insist upon the statute. In the argument of *Cooth v. Jackson*, above cited, it was admitted, that there was no case to this effect; and Lord Eldon, after stating himself to feel all the disinclination which had been lately expressed, to take cases out of the reach of the statute farther than they had been already carried, declared that the circumstance, of there having been no such case, would very much weigh with him; it being his purpose not to form a new head of cases out of the statute.

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In *Child v. Godolphin*,^(m) however, it appears to have been the clear opinion of Lord Macclesfield, that whether *part-performance is or is not alleged in the bill, though the defendant may plead the statute, he must answer to the parol agreement, and confess or deny its existence, and that if he confess it, the court will enforce it; and, indeed, it seemed of course that the statute would not be suffered to avail the defendant, if he was bound to confess or deny after pleading it; for it would be a nugatory exertion of jurisdiction, and sporting with the conscience of the party to urge him to speak out as to the agreement, unless they meant to compel the performance thereof, if confessed. The case of *Cottingham v. Fletcher*, reported in *Atkins*,⁽ⁿ⁾ which contains a like opinion of Lord Hardwicke, is said, in *Moore v. Edwards*,^(o) to be a complete misstatement. The reporter represents Lord Hardwicke to have overruled the defence upon the statute,

(1) 6 Bro. P. C. 45. (m) Cited by Lord Thurlow in *Whitchurch v. Bevis*, 2 Bro. 556; and see 1 Dickens's Reports, 39. (n) 2 Atk. 155. (o) 4 Vez. jun. 24.

stantiating agreements by writing in certain cases therein particularised, in order to avoid altogether the lubricity of memory, and the opportunities of perjury and fraud, his Lordship found himself reduced, by the unsteadiness of former decisions, to the necessity of computing the degrees of the weight and value of different descriptions of verbal testimony, in a case expressly comprehended within the statute.

merely on the ground that the agreement was admitted. But Lord Rosslyn said, that it appeared by Lord Hardwicke's own notes, that he determined the case upon the fact of the agreement's having been in part executed.

In the first argument upon the plea in *Whitchurch v. Bevis*,^(p) Lord Thurlow appeared to be influenced by the case of *Child v. Godolphin*, to hold, that if nothing is stated in the bill but the parol agreement, the defendant ought to support his plea by an answer denying the parol agreement. But upon the second discussion of the case, his Lordship allowed the plea of the statute, although the parol agreement was confessed by the answer. It appears that Baron Eyre, in two cases which came before him in the Exchequer,^(q) was of opinion, that if the defendant, by his answer, insisted upon the statute, a specific performance could not be decreed. Lord Rosslyn, we have seen, held the same opinion in *Moore v. Edwards*;^(r) and though not the point of adjudication, yet the weighty declarations of the present Chancellor, in the case of *Cooth v. Jackson*,^(s) leave us hardly any room to doubt that it will hereafter be the doctrine of courts of equity, that the defendant may admit the agreement without being precluded by such admission from praying to have the benefit of the statute.

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If a bill, therefore, should now allege an agreement without stating it to be in writing, or averring part-performance, it seems that the plea of the statute alone, without any answer, would repel the plaintiff from the relief sought by him. But if acts of part-performance are set forth in the bill, the defendant must answer as well as plead: he should plead the statute, and deny the acts of part-performance; and if the acts alleged are found not to amount to part-performance, the plea will be allowed.

Acts of part-performance, and also an agreement in writing, are now commonly stated in the bill, to avoid the demurrers, and to compel the defendant to answer; the rule being, that the defendant must answer to all parts of the bill upon which the plaintiff could be entitled to relief. But although where the plaintiff in his bill alleges acts of part-performance, the defendant is regularly put to answer, yet, according to the present strong inclination,

(p) 2 Bro. 566. (q) *Eyre v. Iveson*; and *Stewart v. Careless*, cited in *Whitchurch v. Bevis*, 2 Bro. C. R. 563, 564. (r) 4 Vez. jun. 23. (s) 6 Vez. jun. 37.

I had almost said the prevailing doctrine of the courts of equity, he is not laid under a necessity of simply denying or confessing the answer, but he may admit the parol agreement, and insist upon the statute, and also contest the acts of part-performance; but if he confesses the agreement, without saying any thing about the statute, though the bill states acts of part-performance, there will be no occasion for him to prove these acts, such necessity being superseded by the defendant's admission. If he denies the agreement, and the part-performance, both the agreement and part-performance must be substantively proved; for proof of part-performance will not evidence the terms of the particular agreement, however it may avail to establish the existence of some agreement; and when this is the state of the pleading, the parties are placed in the predicament which has been explained a few pages above, in which, a mysterious logic has not seldom triumphed over the good sense and policy of the statute of frauds.

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Experience of the ill effects of treating cases as out of the spirit which have been obviously within the letter of the statute, seems to have recalled our courts, both of law and equity, to a severer rule of practice; and particularly in respect to the doctrine of part-performance, the law seems to be regaining its proper limit, and recovering land out of the ocean. Before the acts of a party can be construed as amounting to part-performance, it seems that he must receive a prejudice⁽¹⁾ thereby, for they are not received merely as evidence of the agreement, but they must be such as may be fairly imputable to a design to perform, and capable of being considered as an inceptive execution of the contract: they ought to be clear and unambiguous in respect to their object; and perhaps it may not be presumptuous to infer from the present apparent disposition of the courts to give effect to the statute, that they would hardly suffer a case to be taken out of its reach by a part execution, composed of minute and incipient acts, reversible without trouble or cost, or open to an easy and immediate compensation.⁽⁸⁰⁾ This hope is

(1) Vide *Buckmaster v. Harrop*, 7 Vez. jun. 340.

(80) *Gunter v. Halsey*, Ambler, 586. *Whitbread v. Brockhurst*, 1 Br. C. R. 412. *Whaley v. Bagenal*, 6 Bro. P. C. 45. *Wills v. Shadling*, 3 Vez. jun. 379. *Pym v. Blackburn*, 3 Vez. jun. 34; and see *Cooth*

enlarged by the perusal of the recent case of *Cooth v. Jackson*, where the present Chancellor is stated by the reporter to have said "the most rational way seems to me to be, that if the defendant admits the agreement, but insists on the benefit of the statute, there is no occasion to inquire about the part-performance."

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It has before been observed in the introductory chapter, that care ought to be taken to note the distinction between cases where the resort to equity is for the specific performance of an unwritten agreement, and where the bill being for the execution of a written agreement, the application is endeavoured to be repelled by setting up a subsequent parol agreement, whereby, on good consideration, the first agreement was meant to be modified; for though equity cannot, unless on the ground of some plain acts of part-performance, or the confession of the party, establish a contract in the teeth of the statute of frauds, yet the court will on slenderer grounds suffer a parol agreement to weigh as an inducement to refuse its assistance, in carrying into effect the first agreement(x). But although this doctrine is said to turn upon the discretion in the court to grant or withhold its peculiar and extraordinary remedy, of compelling specific performance, it should not be forgotten by us, that this discretion has its bounds, and that it must be regulated by principles of judicial analogy and consistency.(x)

(x) See *Legal v. Miller*, 2 Vez. 299, but especially the case of *Wooliam v. Hearn*, 7 Vez. jun. 211. (x) 9 Vez. jun. 35, *White v. Damon*.

v. Jackson, 6 Vez. jun. 41, where it was held, that upon a parol agreement for a compromise, and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, as surveying, &c. cannot be considered as acts of part-performance. The authority of the case of *Sir James Lowther v. Caril*, 1 Vern. 221, wherein the court seems to have thought that alterations made in the draft by one of the parties, and his sending it to the other to execute, took the case out of the statute, is opposed by that of *Hawkins v. Holmes*, 1 P. Wms. 770.

*PART III.

17th Section and 5th Clause of the 4th Section.

Contracts for the Sale and Purchase of Goods and Chattels.

HAVING considered how contracts for the sale of lands are affected by the statute, I shall proceed in this division of the work to examine its operation on contracts for the sale and purchase(81) of goods, or moveable chattels, which will lead us in a somewhat connected order of inquiry to the subject of the 17th section, and the 5th clause of the 4th section, of the statute in question. By these branches of the statute, it is provided, that no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, or gives part of the price to the vendor by way of earnest to bind the bargain, or in part-payment; or (unless some note or memorandum in writing be made, and signed by the party, or his agent, who is to be charged with the contract: and, with respect to property of whatever value,(82) that no contract or agreement regarding the same shall be valid, unless the thing contracted for is to be delivered within one year, or unless the contract be made in writing, and signed by the party; or his agent, who is to be charged therewith.

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*Before this statute thus modified the obligation of these contracts, a bargain for the sale and purchase of goods, at a future stipulated time, provided there was a *quid pro quo*, or that motive or consideration, which our law requires to raise an actionable de-

(81) This section does not affect exchanges, where one commodity is given for another; *in permutatione discerni non potest uter emptor uter venditor sit.* Vid. Dig. lib. 18, tit. 1.

(82) This clause is general with respect to all agreements whatever. But as agreements respecting lands are included in the clause which was considered in the second part of this chapter, whether they are for immediate or future execution, I have judged it proper to treat of the 5th clause of the 4th section, respecting contracts not to be executed within the space of one year from the making, as to its operations only on contracts for goods; and have therefore included the consideration of it in the same part with that of the 17th section.

mand upon *any* contract, was unrestricted in distance of time, and not necessary to be accompanied and ascertained by those acts of payment, or delivery of part, or the whole, of the thing contracted for, which, in contracts or bargains to be *presently* executed, were necessary to their obligation and completion, and to the legal alteration of property in the subject between the contracting parties.

But a bargain and sale of a chattel, where no future day was assigned between the parties for the delivery and payment, unless earnest was given to bind the bargain, required a simultaneous or consecutive payment or delivery to fix the contract, and transmute the property; for if the sale was immediate, and the buyer made no payment or tender, the owner was at liberty to dispose of the goods as he pleased; nor was he compellable to part with the goods before payment of the price by the purchaser; and if before such payment they were taken or removed by the buyer, it was an injury for which an action of trespass lay for the recovery of damages,^(y) or the owner might waive the wrong, and insist upon the contract by his action of debt or assumpsit, being allowed under these circumstances to consider the contract as executed or anticipated by the acts of the other party.

But before, as well as since, the statute payment of earnest was always considered as perfecting the bargain, so as to preclude the retraction by the one without the consent of the other, and to give to the buyer an action for the goods, and to the seller an action for his money, the property being changed by such payment of earnest, no matter how small the sum. If I say that I will sell my horse for 20*l.* and a person offers to buy it at that price, but does not presently tender the money, it is no contract, and though the party should come again *with the money in his hand*, I am at liberty to accept it, or to refuse to sell, or to demand a larger sum, according to my pleasure. But if he had proceeded forthwith upon the price being named, to count out his money, and in the mean time I had sold the horse to another, he might take his remedy against me by action upon the case.^(z)

In bargains and sales of chattels without any reservation in respect to time, the property is not altered, unless earnest be given or payment made, or possession either partial or total delivered.

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(y) Mod. 137. (z) Noy's Max. c. 42, n. 87. Dyer 30, 76. Shep. Touchstone, 222. Hob. 41, 42. Plowd. 432.

These heads are, well recapitulated in the Touchstone thus :
 " If a man, by word of mouth, sell to me his horse, or any other thing, and I give or promise⁽⁸²⁾ him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing for money, or other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is appointed for the payment of the money—or all or part of the money is paid in hand—or I give earnest money to the seller—or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day appointed for the payment ; in all these cases, there is a good bargain and sale of the thing to alter the property thereof. And in the first case, I may have an action for the thing, or the seller for his money ; in the second case, I may sue for and recover the thing bought ; in the third case, I may sue for the thing bought, and the seller for the residue of his money ; in the fourth case, *i. e.* where earnest⁽⁸³⁾ is given, *we may have reciprocal remedies against each other ; and, in the last case, the seller may sue for his money."

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Payment of earnest alters the property, but not so as to give a right to the possession without payment.

By the payment of earnest it has been stated, that the bargain is complete, and the property is transferred from the vendor to the vendee, and the price to be given for it is vested in the vendor, and I apprehend it to be quite clear, that the vendee may bring his action for the goods, and the vendor *his* action for the price of them ; which seems to be a consequence of and to suppose a transmutation of property. But we are to observe, that notwithstanding the earnest given, the absolute right to the immediate possession is not so transferred with the property in the thing, as that the vendee may take the goods without first paying or tendering the price agreed upon ;^(a) but if he tenders the price to

(a) Hob. 41.

(82) That is, supposing there to be an agreement between the parties.

(83) The question, whether money paid was paid as earnest or not, must be determined by the destination expressly given to it by the person paying, for *quidquid solvitur, solvitur ad modum solventis*, Pinnel's case, 5 Rep. 117. But then it seems he ought to declare on what account he pays it, at the time of paying it. See *Manning v. Western*, 2 Vern. 606, and see 2 Esp. N. P. Ca. 666.

the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. In the *nisi prius* case of *Langfort v. the administratrix of Tiler*, (b) it was ruled by Chief Justice Holt, that notwithstanding the earnest, the money must be paid upon fetching away the goods, where no other time for payment was appointed. That earnest only binds the bargain (84) and gives a party a right to demand; but

(b) 1 Salk 113.

(84) The attentive student will observe a considerable difference between the effect of earnest (*arra*) in the civil law, and in our own; to which probably another striking difference in the circumstances constituting the perfection of the contract upon the *EMPTIO ET VENDITIO*, and our *BARGAIN AND SALE*, has given birth. We have observed, that a bargain and sale in the law of this country, where no future day is assigned by the parties for the payment or delivery, nor any earnest given, requires an *immediate* delivery or payment to fix the contract, and make it obligatory upon the parties; and that upon ready money contracts (and every contract must be so understood, unless the contrary be expressed) if the buyer makes no payment or tender upon the spot, the owner is at liberty to dispose of the goods to whom he pleases. The dread of perjury, characteristic of our earliest legal ordinances, required some ostensible act to assure the bargain, and the payment of earnest had this effect given to it; the law considering that, without this act of confirmation, the transaction imported not a settled bargain, but only a communication *about* a bargain.

The doctrine of the civil law in respect to earnest.

But, in the civil law, neither payment, nor delivery, nor earnest, was necessary to conclude the bargain, but simply, the convention of the contracting parties. The perfection of the contract was one thing, and the consummation or fulfilment another. Agreement concerning the thing purchased, and the price to be given, established the *emptio et venditio*, which was consummated by the payment and delivery. As soon as the bargain was struck, the obligation of performance reciprocally attached, and a right of action respectively to enforce it. *Ut primum de re et pretio convenit, emptio perfecta intelligitur, quomodo nec res traditur, nec pretium numeratum, nec arrha data sit. Atque in contractibus qui consensu perficiuntur, distinguenda perfectio contractus a consummatione sive implemento. Emptionem et venditionem perficit solus consensus de re et pretio; consummat rei traditio et pretii numeratio, qui extremus est contrahentium finis: simul atque autem emptio perfecta est, nascitur utrinque obligatio, teneturque emptor actione ex vendito, ut nummos, quos pretii nomine pro re vendita promiserit, solvat; venditor actione ex empto, ut rem venditam tradat emptori. Vin. lib. 3, tit. 24.*

then a demand without the payment of the money is void ; but that after earnest given, the vendor cannot sell the goods to another, † [169] without a default in the vendee ; and, therefore, if the

But we are to observe, that though the perfection of the contract arose upon the agreement without payment, delivery, or earnest, yet that this was not a mere loose and casual agreement, but was required to be negotiated in certain stipulatory forms of question and answer, which served to mark a deliberate purpose in the parties, and, therefore, could better dispense with the circumstances of authentication made necessary by the common law of England ; and though the *solemnia verba*, the determinate forms of interrogation and response, as *spondes ? spondeo ; promittis ? promitto ; fide promittis ? promitto ; fide jubes ? fide jubeo ; dabis ? dabo ; facies ? facio* ; settled by the earlier juriconsults of the Roman law, were relaxed by the Leonine constitution, their substance and effect always remained essential to the constitution of a binding bargain. *Et si autem scrupulosa hæc verborum observatio a Leoni postea sublata est, illud tamen ad vim, atque substantiam stipulationis adhuc requiritur, ut fiat utroque loquente, ac proinde verbis ex utraque parte interveniant, ut promittens respondeat congruentem interrogationis, idque hæc notabili intervallo, et animo ac proposito contrahende verborum obligationis. Id. lib. 3, tit. 16.*

There being no such solemn verbal ratification of a bargain in our law, as did once more technically, and still substantially remains in the civil law, an effect is given among us to the earnest which did not belong to it in the law of the empire, viz. that of specifically binding the bargain. According to the text and commentaries of the civil lawyers, the *arra* or earnest is given, not to perfect the contract, which is complete without it by virtue of the stipulation, but it is given for the better manifestation of the agreement, *quo facilius probari possit convenisse de pretio*. It is, say those writers, either symbolical, as where a ring is given, or it may be a part of the purchase ; and if it is in part payment, yet this is not considered as a part execution of the contract ; so that if the agreement be not otherwise perfected, as for example, if it was part of the agreement that the contract should be reduced into writing, which is not yet done, whereby the perfection of the contract is suspended, the anticipated payment of a part of the price, by way of earnest, will not prevent the contract from being *integral*, as it is called ; the consequence whereof is, that either party may recede from the bargain. But such refusal, after earnest given, must, if made on the part of the buyer, be followed by the forfeiture of the earnest so paid, and if on the part of the seller, by a return of the earnest, with a duplication of its value. With this consequence, the payment of earnest, according to the civil law, leaves a *locus penitentiae* to both parties, if the bargain has been otherwise left incomplete ; but it does not give or create

vendee does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay and take away the goods, in convenient time, the agreement is dissolved, and the seller is at liberty to sell them to any other person.

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The statute of frauds has given no new efficacy to the payment of earnest; it has only excepted the cases wherein earnest has been paid out of the new requisition it has made for written evidence of a contract for the sale of goods, for the price of 10*l.* or upwards. In respect to those executed bargains, in which the nature of the dealing between the parties implies the contemplation of an immediate delivery of the thing and payment of the price, wherein there is hardly room to interpose a written contract, the transactions of mankind continue the same; but their rights and obligations, even in these hourly dealings are materially varied. If before the statute, a man offered to sell his horse for 20*l.* and another offered to buy him at that price, and presently tendered the money, the bargain was concluded, and the party proposing to sell was not at liberty to dispose of the horse to a new purchaser. By the operation of the statute, however, such owner would be perfectly free to sell the horse to a third person, unless the party first offering to purchase could substantiate the first bargain, by the production of a note or memorandum, in writing, signed by the seller, of the terms of such bargain. Again, before this statute, if a person had bought a piece of cloth for 10*l.* and it was agreed between the seller and buyer, that the goods should remain with the seller, until the purchaser could go home to his house to fetch the money, the seller was precluded in the interim from selling the same merchandise to another, and upon the subsequent tender and refusal of the money agreed

Effect of
the statute
on bargains
and sales of
goods.

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any *locus penitentiae*, as seems by some commentators to have been erroneously conceived, so that if the bargain has been by other means rendered perfect, by the payment of earnest the remedy is doubled to the parties, who may either sue upon their rights reciprocally to have the bargain completed, or may resort to the compensation afforded them respectively, by the payment of earnest, the seller to the forfeiture thereof, and the buyer to his action for compelling the restoration of what he has so paid, with a duplication of its amount. See Dig. lib. 18, 19, tit. 1, C. lib. 4, tit. 38. 40; and see the Commentary of Vinnius thereon, lib. 24, tit. *De emptione et venditione*.

upon, the buyer might take or recover the cloth. But the statute in such a case has afforded a *locus penitentiae*, and without a note in writing with the seller's signature, the buyer would lose his bargain by the delay, and in such a case the statute would be considered as preventing the property from vesting, there being neither earnest, delivery, nor agreement in writing.(c)

That executory contracts for goods are within the 17th section of the statute.

The doctrine in relation to this section of the statute, was formerly so narrow, as to regard *executory* contracts for goods entirely out of its reach. Thus, where the defendant bespoke a chariot, and when it was made, refused to take it, and in an action for the value, the statute was objected, no note in writing, or earnest, having been given, Pratt, Ch. J. ruled this not to be a case within the statute, which, he said, related only to contracts for the *actual* sale of goods, where the buyer was immediately answerable, without time given him by special agreement, and the seller was to deliver the goods immediately.(d) Upon the authority of this *anterior* case, Clayton v. Andrews(e) was a few years afterwards determined by Lord Mansfield, Ch. J. and Yates and Aston, Justices. The defendant, in this last-mentioned case, agreed to deliver a certain quantity of wheat to the plaintiff within three weeks or a month from the said agreement, at a certain rate, to be paid on delivery; which wheat was understood by both parties to be at that time unthrashed. No part of the wheat so sold was delivered; nor any money paid by way of earnest for the same; nor any memorandum thereof made in writing; and the question for the opinion of the court was, whether this agreement was within the statute of frauds. Lord Mansfield held upon the authority of the case in Strange, that it was not. And Mr. J. Yates observed, that the clause of the statute relates only to *executed* contracts. Here wheat was sold to be delivered at a future time. It was unthrashed at the time when the contract was made; therefore, it could not be delivered at *that* time. To which Mr. Justice Aston agreed, adding, that the case of Towers v. Osborne, had always been considered an authority in point on questions of this kind. To this succeeded the case of Alexander v. Comber(f) where, though the case was decided to be within the operation of the statute, Mr. Justice Wilson took occasion to no-

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(c) See Alexander v. Comber, 1 Hen. Bl. 20. (d) Strange, 506. Towers v. Sir John Osborne. (e) 4 Burr. 2101. (f) 1 Hen. Blackst. 20.

tice the then received doctrine of a distinction between executed and executory contracts as to this point; observing, that where a sale is not immediate, it is not within the statute of frauds, such as a contract to purchase a carriage, when it shall be built, or the like.

But this doctrine has received a decisive overthrow by the manly reasoning of Lord Loughborough, in the subsequent case of *Rondeau v. Wyatt*,^(g) wherein his lordship, after reciting the words of the 17th section, declared his opinion as follows: "It is singular, that an idea could ever prevail, that this section of the statute was only applicable to cases where the bargain was *immediate*; for it seems plain, from the words made use of, that it was meant to regulate *executory* as well as other contracts. And, indeed, it seems, that this provision of the statute would not be of much use, unless it were to extend to *executory* contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise which the statute was designed to prevent."

The *principles* of the decision in *Towers v. Osborne*, and *Clayton v. Andrews*, above cited, were thus corrected by the judgment of the Chief Justice, in *Rondeau v. Wyatt*; but the determinations in those cases were saved by a clear distinction taken by his lordship between cases of mere contracts of sale, which are the only species of contract to which the clause of the statute now under consideration is applicable, and those contracts for the sale of goods, where work and labour is to be previously bestowed upon them, and materials and necessary things to be found, and the contract blends subjects together, some of which are not in the contemplation of the statute. Thus, in *Towers v. Osborne*, a chariot was to be built, so that a large proportion of work and labour was contracted for; and in *Clayton v. Andrews*, where the agreement was to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be thrashed before the delivery.⁽⁸⁵⁾

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(g) 2 Hen. Blackst. 63.

(85) But query, is not such contract entire, and instead of being considered as *wholly out of the statute*, because part is not within it, ought it not rather to be treated as *wholly void*, because part is within the statute? Vide *Chater v. Beckett*, 7 T. R. 201. *Cook v. Tombs*, Anstr. 420.

This respectable decision, together with the distinction recognised by the Chief Justice, was confirmed by the unanimous opinion of the Court of King's Bench, in the late case of *Cooper v. Elston*.^(h) The case stated for the opinion of the court was shortly this :—The defendant, on the 4th of July, 1795, at Nottingham, sold to the plaintiff, by sample, 50 quarters of wheat, to be delivered by the defendant to the plaintiff at Gainsborough. Two days afterwards, the defendant delivered to the plaintiff at Nottingham the sample, by which he had sold the wheat to him, but such sample was no part of the 50 quarters to be delivered at Gainsborough. There was neither earnest paid nor memorandum in writing. Lord Kenyon expressed himself gratified, that after the question had so long been afloat in the courts, the construction of this clause of the statute had been brought back to the manifest intention of the legislature, in making the provision, and the rest of the judges agreed with him in sentiment. The distinction between the contracts where the thing contracted for was complete and ready for delivery, and existing in *solido*, as was its condition in *Rondeau v. Wyatt*, and the case before them, and those wherein something was required to be done, *in order to put the thing into the state in which it was contracted to be sold, was adopted by the court.

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A delivery of the whole or part takes the case out of the statute.

But this may be a *virtual* delivery.

If there is a delivery either of the whole or a part of the thing sold, the contract need not be in writing. But an *actual* delivery is not in all cases necessary. The thing contracted to be sold may be *virtually* delivered, and such virtual delivery will be effectual to supersede the necessity of writing and signing. If, therefore, the goods sold are ponderous, and not capable of actual delivery, and the buyer accepts them, and in virtue of such transfer of the property, proceeds to exert a right over them, disposing of them, or giving orders and directions respecting them, as the owner thereof, such proceedings may countervail the *actual* delivery, and vest the property in the buyer, without any written contract or earnest paid, notwithstanding the statute of frauds; and though it is proper for the court to say, whether a case does or does not fall within the statute, yet it may be specifically put to the jury to say, whether upon the evidence there was or was not an acceptance of the thing by the purchaser. Of which doctrine the recent case of *Chaplin v. Rogers*,⁽ⁱ⁾ is an example.

(h) 7 T. R. 14.

(i) 1 East, 192.

In that case, the parties being together in the farm-yard of one of them, a treaty took place between them, for the purchase of a stack of hay standing therein, and after some doubts expressed by the buyer, as to the quality of the hay, it was agreed for at the price of 2s. 6d. per hundred weight. About two months after this transaction, a farmer agreed with the buyer for the purchase of part of this hay, which was still standing untouched in the farm-yard of the original owner. L. was told by the first purchaser to go and see what condition the hay was in, as he had only agreed for it in case it was good. L. having examined it, reported it to be in a good state, and agreed to give the first purchaser 3s. 6d. per hundred weight, being told by him that he had agreed to give 3s. 6d. per hundred weight to the original owner. L. brought away thirty-six hundred weight of the hay, in virtue of this sub-contract; but this act of the second purchaser was without the knowledge and against the direction of the first. The original seller brought an action against the first purchaser for goods sold and delivered. In which action there was a contrariety of evidence respecting the quality of the hay. Two grounds were made for the defendant on the trial; first, actual fraud in the sale; and secondly, the non-compliance with the statute of frauds. The judge left it to the jury to decide, whether the sale was fraudulent, and whether, under the circumstances, there had been a sufficient acceptance by the defendant. And they found for the plaintiff upon both points, and gave him damages to the value of the hay, at the price agreed for. A rule nisi was obtained for setting aside this verdict, and having a new trial, on the grounds that the judge had left that as a question of fact to the jury, which he himself ought to have decided as an objection in point of law, arising on the statute of frauds, and because the evidence did not warrant the verdict; but upon cause being shown the rule was discharged; the Chief Justice observing, that it was proper to leave the question specifically to the jury, whether or not there was an acceptance of the hay by the defendant; and that they had found that there was, which had put an end to any question of law. That he did not mean to disturb the settled construction of the statute; that in order to take a contract for the sale of goods of this value out of it, there must either be a part-delivery of the thing, or a part-payment of the consideration, or the agreement must be reduced to writing, in the

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manner therein specified ; but he was not satisfied in that case, that the jury had not done rightly in finding the fact of a delivery ; that where goods were ponderous, and incapable of being handed over from one to another, there needed not to be an actual delivery ; but it might be done by that which was tantamount ; that the defendant had dealt with the commodity as if it had been in his actual possession. The other judges agreed, that there was sufficient evidence of a delivery to and acceptance by the defendant, to go to a jury.

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A still stronger instance of the efficacy of this virtual delivery, *to take a case out of the statute, occurs in the *nisi prius* case of *Searle v. Keeves* ;(k) which was an action on the case for the non-performance of a contract, with the following circumstances attending it ; the plaintiff having been at the house of the defendant, the defendant told him that he had a quantity of rice to sell ; but there was no evidence to prove any contract made at that time. The plaintiffs produced an order on Bennett and Company, to deliver to them 20 barrels of rice, which order was signed by the defendant Keeves. And some witnesses in the cause proved that Keeves had told them that he had sold 20 barrels of rice to Searle the plaintiff, at 17s. per hundred. The delivery of the order to the warehouseman of Bennett and Company was proved, and that the rice not being then taken away, Keeves countermanded the delivery to Searle the plaintiff, in consequence of which, Bennett and Company refused to deliver the rice to Searle. Eyre, Ch. J. was of opinion, that there was in this case a delivery of the whole. That the order for the delivery satisfied the statute ; and consequently that the plaintiffs were entitled to recover.

* An actual delivery of the thing is sometimes not a delivery effectual in law to change the property.

But the understanding and intention of the parties must controul the construction of these cases. We have seen that there may be a delivery in law effectual to the purpose of satisfying the statute of frauds, without a manual transfer or actual receipt of the thing contracted for ; but it must be observed also, that in some cases where there has been an actual receipt and handling of the goods, the delivery may nevertheless be incomplete, and the bargain renounced by the buyer, if there has been no earnest given, or note or memorandum in writing. The law was ac-

(k) 2 Esp. Ni. Pr. Cas. 598.

cordingly so held in the case of *Kent v. Hutchinson*(1) lately decided in the Common Pleas.

The subject of the action in that case, which was for goods sold and delivered, was a bale of sponge, sent by the plaintiff, a wholesale dealer in that article, residing in London, to the defendant, a retail dealer residing in Staffordshire. *A short time before the sponge was sent by the plaintiff, he had been at the place where the defendant resided, and had received from him a verbal order, under which he had acted in sending the sponge, and the price charged was 11s. per pound. Soon after the sponge had been sent, the defendant wrote the following letter to the plaintiff :—

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“ After receiving a letter from your house in town, stating that the bale of sponge was sent by your direction, I called in a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth ; the answer was, not more than 6s. per pound ; I have therefore, returned it to you by the same conveyance it was forwarded by to this place. In future, I will select what sponge I may want personally ; otherwise will appoint some confidential friend for that purpose.” The plaintiff’s son being at the defendant’s house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as was expected. It was objected for the defendant, that as this was a contract for the sale of goods of more than 10*l.* value, the case fell within the 17th section of the statute of frauds. And Lord Alvanley, who tried the cause, was of that opinion ; and his Lordship afterwards, upon a motion to set aside this nonsuit, declared that he still continued of opinion, that the evidence did not take the case out of the statute ; for how was any judgment to be formed as to the nature of the contract between the parties : possibly the order was for the best, possibly for the second best sponge, or for sponge of some peculiar quality ; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute was meant to guard against. The only affirmance of any contract to be collected from the evidence, was an affirmance of some sort of order for some sort of sponge, and it appeared, that the moment the article reached the defendant, and was examined, he sent it back to the plaintiff, saying

(1) 3 Bos. et Pull. 232.

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that it was not that sort of sponge which he wanted and had ordered. The defendant's letter, therefore, his Lordship said, could not, as it appeared to him, be construed *into any thing like an acceptance, so as to bring the case within the exception which had been relied upon. The rest of the judges were clear of the same opinion with his Lordship, and particularly Mr. J. Chambre observed, that certainly there was no acceptance of the goods by the defendant, unless a refusal could be considered as amounting to an acceptance.

There must be an absolute acceptance to make an actual delivery effectual, to preclude the vendee from objecting to the want of writing.

It appears, therefore, that with respect to the buyer, there must be an absolute acceptance, and such as completely affirms the contract; though this acceptance need not be in express terms, but may arise constructively out of the acts of the vendee, as we have seen in the before cited case of *Chaplin v. Rogers*. But it seems clear, that if there has been a delivery, either actual or virtual, by the vendor, in pursuance of a verbal sale, *he* has lost the power of retraction under cover of the statute, if the vendee chuses to treat the contract as complete. Thus, in all those cases wherein the law would regard the goods as vested in a consignee or vendee absolutely as against both parties, where such goods had been sent in execution of a written order; it should seem that such delivery would be perfect and conclusive against the consignor or vendor under a verbal contract, notwithstanding the statute, upon the principle of considering the contract as executed on his part, so as to enable the buyer or consignee to say the contract was complete, by testifying in any manner the accession of his own consent or acceptance.

Of the doctrine with respect to the vesting by delivery to the carrier, as between the consignor and consignee.

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Where there is a written evidence of the contract, so as to put the statute out of the question, the doctrine is of old standing, that if the purchaser of goods orders them to be sent to him by a particular conveyance, he is liable to the seller though the goods be lost by the carrier; as in *Vale v. Bayle*,^(m) which was an action for goods sold and delivered, and at the trial, a letter from the defendant to the plaintiff was produced, containing a commission to the plaintiff for the *goods in question, after which was a postscript, saying, "pray be expeditious in sending them, and, instead of letting them go by way of Bristol, send them by land carriage." The delivery of the goods to the carrier was proved; and it appeared that there was no other con-

veyance by land carriage, than that which was used. The goods having been lost on the road, it was insisted on behalf of the consignor, the plaintiff, that the delivery to the carrier was a delivery to the defendant; but the judge being of a different opinion, directed a nonsuit. But a rule *nisi* which was granted for setting aside the nonsuit was made absolute, and a new trial granted upon the doctrine, that if a vendor takes upon himself actually to deliver the goods to the vendee, he stands to all risks; but if the vendee order a particular mode of conveyance, the vendor is excused; the delivery being complete in law, and the property being vested in the vendee.

This principle was, in a subsequent case, confirmed by its application to the question, as to the proper party to bring the action in case of loss by the carrier. In *Dawes v. Peck*,⁽ⁿ⁾ it was decided, that though the seller had paid for the booking, yet that he could not maintain the action against the carrier, which was exclusively the right of the vendee; the Chief Justice^(o) observing, that he could not subscribe to the argument urged on behalf of the plaintiff—that the right of property on which this action was founded, was to fluctuate according to the choice of the consignor, or consignee; and that, consequently, either of them might, at his pleasure, maintain an action against the carrier for the non-delivery of the goods. His Lordship was of opinion, that the question must be governed by the consideration, in whom the *legal right* was vested, for that *he* was the person who had sustained the loss, if any, by the carrier. The *damnum et injuria* were to *him* and not to the vendor, the plaintiff. His Lordship further said, that he did not find that any thing which he had advanced, had been broken in upon by the two cases of *Davies v. James*,^(p) and *Moore v. Wilson*,^(q) which had been relied upon in the argument. That he fully adopted the distinction taken in those cases. That in one case the action brought by the consignor against the carrier was sustained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee, for the safe arrival of the goods. And that the subsequent case

(n) 8 T. R. 330. (o) Lord Kenyon. (p) 5 Burr. 2580. (q) 1 T. R. 459.

of *Moore v. Wilson*, proceeded on the same ground.^(85a) The other judges agreed with his Lordship; Lawrence J. adding, that the circumstance of the consignor's having paid the carrier for booking the goods, was not evidence of a special contract between them, so as to bring that case within those of *Davies v. James*, and *Moore v. Wilson*, which had been cited at the bar.

In *Vale v. Bayle*,^(r) above referred to, the designation of the particular mode of conveyance, seemed to have been a circumstance of great weight in the decision of the court; and in the recent case of *Dawes v. Peck*, it was in proof that the carrier was specially appointed by the consignee, though it does not appear what share that fact might have had in influencing the determination. In a very late case, however, in the Common Pleas,^(s) the question came before the court unembarrassed with this fact; and the late Lord Alvanley, in speaking to the point, observed, that it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, *though he do not name any particular carrier*, the moment the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser; the whole property immediately vests in him; *he alone can bring the action for any injury done to the goods; *and if any accident happen to them, it is his risk.* The only exception to the purchaser's right over the goods, was, that the vendor, in case of the former becoming insolvent, might stop them *in transitu*.

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This vesting by delivery to the carrier, takes the case out of the statute, as to the vendor, he having done his ultimate part in the transaction; tho' it seems that, until something is done by way of acceptance on the part of the vendee, or consignee,

These cases have been produced for the purpose of illustrating the doctrine, with its legal consequences of a *virtual* delivery, which we have seen is capable of transferring the property as effectually as an *actual* delivery. In the instances adduced, the statute was out of the question, as the consignments were made in consequence of *written* orders. But the inference they afford to our present purpose, is, as it seems, that if the orders had been *verbal*, the delivery of the goods to the carrier would have been such an execution of the agreement as to the vendor, as to put it out of his power to have taken any advantage of the statute

(r) Cowp. 294. (s) Dutton v. Solomonson, 3 Bos. et Pull. 582.

(85a) But it is not easy to collect this from the report of the case— which see.

in reclaiming the goods. But in respect to the vendee, his acceptance would still be wanting to place *him* in the same predicament of inability to ground upon the statute a refusal to complete the contract. The vendor having done his ultimate part in the transaction, by the delivery to the carrier, it is competent to the vendee to conclude the contract, by any act of express or implied acceptance; but until such acceptance, it is clear, upon the authority of *Kent v. Hutchinson*,⁽¹⁾ and the analogy of the other decisions, that he may refuse to execute the parol agreement, and may even examine the goods, and after examination, reject them. But though, as appears by the above authorities, whether the carrier or the mode of conveyance be specially designated or not by the vendee, the vesting in the consignee equally takes place at the moment of the delivery to the carrier by the consignor; a difference may, nevertheless, possibly arise from the state of this fact, in respect to the question upon the statute; for if the order is particular both as to the goods and the carrier, it seems to furnish a plausible ground, at least for insisting upon the effect of such selection of the thing, and designation of the receiver as amounting to an acceptance, with which the actual delivery, though posterior in time, might be coupled by relation, so as to put the whole transaction out of the reach of the statute.

he is not precluded from taking advantage of the statute.

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Nor can it with reason be contended, upon the principle of the foregoing argument, that if a verbal order is given for goods of such a price and such a quality, there may be evidence to show that the goods sent were answerable in both these respects, and that then the *conditional* acceptance becomes *absolute* by the proof of these facts, so as to make it an acceptance by the buyer from the beginning, and capable, therefore, of taking the case out of the statute, as much as the selection of the goods and the appointment of the carrier or conveyance in the case above supposed: for a difference there clearly is in substance between these cases. In *that* which was last supposed, the acceptance can only be shown by first proving the contract; whereas, where the goods are fixed upon, and the carrier named by the buyer, the contract is established upon the evidence of the acts of the vendee. In the one case you get at the acceptance through the heart of the

(1) 3 Bos. et Pull. 232.

statute ; in the other, the statute is complied with, by proof of a *virtual* compliance with its provisions.

[183] Where goods have been delivered according to a verbal order, and especially if they have actually come to hand, it is to be presumed from the justice of the thing, that the courts will be disposed to construe slight acts into an acceptance on the part of the vendee to take the case out of the statute, and the mere silence of the deliverer may reasonably afford an inference of acquiescence, where an equivocality of conduct, if allowed, must so plainly tend to the prejudice of the other party. The case cited by Mr. Justice Buller, in *Tooke v. *Hollingworth*, (86) is an example of the sort of virtual and prospective acceptance, which has been alluded to above, though the point in the case was to another purpose. Lacy came to the house of the plaintiff, and bought a parcel of tobacco, to be paid for in ready money. This was in the morning. He left orders at his house for receiving the tobacco, and the same day went to France to avoid his creditors. After he was gone, the plaintiff's servant brought the tobacco to Lacy's house, but had no orders to make any demand of the money, but only to deliver the goods. And the question was, whether this was a complete sale, so as to vest the property in Lacy, or whether his bankruptcy between the sale and delivery, was such a fraud as avoided the sale by the non-payment of the money. Lord Chief Justice Eyre held, that the sale was made complete by the act of the plaintiffs, who, by delivery of the goods without demand of the money, vested the property in Lacy by their own assent as complete as a sale *ab initio* without ready money. Here, supposing the bankruptcy out of the case, and that the question had been between the vendor and vendee upon the statute of frauds, the contract must have been considered as completely executed by both parties—by delivery on the one hand, and acceptance on the other.

The statute may be satisfied by other modes of delivery and acceptance of the same virtual kind. Thus the property of a warehouse may pass by a symbolical delivery of the key thereof (u)

(u) 1 Atk. 170.

(86) 5 T. R. 231. The name of the case was *Haswell and others v. Hunt and others*, assignees of *Lacy*, cited from the MSS. of Mr. Justice Burnett.

and, without doubt, the acceptance of such key concludes the purchaser notwithstanding the statute.

*Upon the strength of the words 'accept and receive' in this 17th section, it has sometimes been contended in argument, that only corporeal and tangible things were the subjects of contract embraced within the meaning of that clause. Thus the counsel, in arguing the case of *Pickering v. Appleby*,^(x) which was an action for a sum of money for ten shares of the stock of the governor and company of the copper mines in England, sold to the defendant according to a parol agreement, contended, that where part of the goods cannot be delivered or accepted, it cannot be a contract within the statute, which extends only to such things, part whereof may be delivered or accepted. So in the subsequent case of *Colt v. Netterville*,^(y) it was contended at the bar, that whereas the statute enacts, that no contract should be good for the sale of goods, wares, and merchandises of 10*l*. price, unless part of the goods be accepted or earnest paid, or there was a note in writing, this showed that such goods were intended only as were capable of actual delivery; something that was corporeal, and not stock, which was incorporeal.

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Whether stock is comprehended within the meaning of the 17th section.

This reasoning, however, seemed to be answered with some effect by the counsel on the other side, who contended, that though the statute says, the contract shall be void, unless the buyer accept part of the goods or give earnest, or there is some memorandum in writing; yet that it was not necessary that the thing contracted for should, by that statute, be such as could be delivered into the other party's hands. That it was sufficient that part of the goods be accepted, or that there be earnest, or some memorandum in writing; and, therefore, if the goods cannot be delivered, if there be earnest or a memorandum in writing, it is sufficient. And it was asked, if in the case of a contract for goods imported in a ship, the contract should be held to be not within the statute, because the goods could not be delivered till the arrival of the ship. It was further, on the same side, observed, that the intention of the act was to prevent frauds and perjuries, which were equally dangerous in contracts for stock as for land, or any other thing. And that, therefore, the intention of the legislature seemed to be aimed at *all contracts*; and

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(x) Com. 354. (y) 2 P. Wms. 307.

that it was the more probable, that stocks were meant to be included, because traffic in them was used long before that act. According to the report in Comyns, the judges being divided in opinion, the case was adjourned. But we learn from Lord Chancellor King, in *Colt v. Netterville*,^(z) that the question came afterwards before all the judges of England, who were equally divided upon it, six against six.

But in the case of *Mussell v. Cooke*,^(a) where the plaintiff had agreed with one Green, the defendant's broker, for 5,000*l.* South Sea Stock, at 187 *per cent.*, to be delivered about ten days after, and on the day appointed the plaintiff attended at the transfer office all day, but the defendant did not come, and the stock having in the mean time considerably risen, the defendant refused to transfer it; the plea of the statute seemed to Lord Chancellor Macclesfield to be good. This last-mentioned case of *Mussell v. Cooke* came on in Trinity term 1720, and was probably the case alluded to in *Cruce v. Dodson*,^(b) wherein the court said, that it had been determined in Chancery, that bargains relating to stock are within the statute of frauds, and if earnest be not given are *nuda facta*.

In *Colt v. Netterville*, the bill was for a specific performance of an agreement for transferring some York Buildings stock, stating that the defendant had agreed to transfer it to the plaintiff on a particular day therein mentioned, on the plaintiff's paying the money, and that the plaintiff agreed to pay so much per cent, and to accept the transfer, and did thereupon pay to the defendant 6*d.* earnest. To which bill the statute of frauds was pleaded, denying that the defendant received or accepted the 6*d. as earnest*. The Lord Chancellor considered the plea as ill pleaded, and overruled it on the ground, that *it was not material how or in what manner the defendant received it, but how the other paid it; upon the doctrine in *Pinnel's case*,^(c) But his Lordship^(d) seemed to incline against construing the 17th section of the statute to extend to stock, "adverting to the case of one Wolstonholme, who was declared a bankrupt as having East-India stock; but which decision was afterwards reversed by an act of parliament,^(e) declaring that neither he nor any other person should be liable to bank-

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(z) 2 P. Wms. 307. (a) Prec. in Chan. 533. (b) Select Cas. in Chan. in Lord King's time, 41 Trin. 11 G. 3. (c) 5 Rep. 117. (d) Lord King. (e) 13 and 14 Car. 2, c. 24.

ruptcy, in respect of their having East-India stock ; so that, his Lordship said, stocks, or the dealing in them, will not make a man liable to bankruptcy ; nor do they seem to be wares, goods, or merchandise, within the intent of that clause."

It is to be observed, however, that the statute of 13 and 14 Car. 2, alluded to by Lord King in the above-mentioned case of *Colt v. Netterville*, had a view only to the protection of persons possessing shares in the stocks of certain companies, wherein they laid out their money merely by way of investment, and not for the purpose of trading therein ; the dividends on which stock were made partly in goods, and which the parties sold again in order to turn their property to account ; but having made themselves partners in a trading company, they had become in danger of being considered as traders. But the statute makes no mention of buying and selling the stock itself.

The mere buying, however, and selling of stock will not make a man liable to the bankrupt laws ; but the reason given in the above-mentioned case of *Colt v. Netterville*, by Lord King, does not seem to be satisfactory, although it was adopted by the learned Author of the Commentaries.^(f) The better reason appears to be, that where the stock is held as an investment of property only, and not as a trading capital, the buying and selling is a speculation whereby a man seeks to increase his fortune, but not a trading whereby he seeks his living.⁽⁸⁷⁾ That stockbrokers or persons who buy and sell stock in the public funds by commission are within the statute concerning bankrupts, is a matter of no doubt ; as a species to which the general term 'Broker' in the statute 5 Geo. 2, c. 39, clearly extends.⁽⁸⁸⁾ So that the argu-

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(f) 2 Bl. Com. 476.

(87) Still less, as it seems, will the mere possession of stock expose a man to the operation of the bankrupt laws, unless, perhaps, as holder of a share in a trading company, he has made himself a participant of the profit and loss of such company, instead of receiving a fixed dividend. But by particular statutes, the holders of stock in many of the public trading companies, are declared not liable to be made bankrupts in respect of their stock. As members of the Bank of England—East-India—South Sea—or English Linen Companies—The Royal Fishing Trade—The London Assurance, or Royal Exchange, &c.

(88) The words of which statute are, "whereas persons dealing as bankers, brokers, and factors, are frequently entrusted with great sums

ment mainly relied upon by Lord King for considering contracts for stock as out of the statute of frauds seems to want support.

The preliminary topics treated of in the beginning of this chapter, have embraced many particulars which it would otherwise have been proper to have introduced in this part of the work. Among others, the subject of auctions has been much considered in discussing the questions respecting the form of agreement sufficient to satisfy the statute. This third part of the present chapter may, therefore, be properly concluded with a few cases and observations on the 5th clause of the 4th section of the statute respecting agreements not to be performed within the year.

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If the executory promise be capable of being performed within the year, though it is liable also to be, and in the event is, suspended for a much longer period of time, it is not within this branch of the statute.

*The case of *Fenton v. Emblers*, executor of May, (g) furnishes the true, and, indeed, almost the whole exposition of this provision of the statute. It will be necessary to give a short statement of it for the sake of introducing Mr. Justice Dennison's observations. The doubt was upon the 5th count, which stated, "that the said William May, the defendant's testator, in consideration that the said Sarah, the plaintiff, would be and become the housekeeper and servant of the said William, and take upon herself the care and management of his family, &c. undertook and promised to pay wages to the said Sarah, at and after the rate of 6*l.* for one year—and also, by his last will and testament, to give and bequeath to the said Sarah a legacy or annuity of 16*l.* by the year, to be paid to her yearly, &c. and that the said Sarah confiding in the said promise, entered into the said testator's service, and became his housekeeper, &c. and continued so for three years and 59 days; but that the said William had not performed his said agreement, and did not leave her such legacy and annuity," &c. and it appeared upon the evidence that there was such an agreement between the said William May and the plaintiff, but that it was by parol and not in writing. It appeared also that the plaintiff did enter into the testator's service, and continued in such service till his decease; but that the testator did not give her by his last will or otherwise, the said annuity of 16*l. per annum*, or any other an-

(g) 3 Burr. 1278.

of money, and with goods and effects of very great value; belonging to other persons; it is hereby further enacted, that such bankers, brokers, and factors shall be, and hereby are declared to be subject and liable to this and other the statutes made concerning bankrupts."

nuity. An objection was taken upon the 4th section of the statute of frauds, that the agreement was not to be performed within the year. And it was said that it would be extremely inconvenient to establish promises of this kind, not reduced to writing; that the agreement could not be performed on May's part within a year, for a whole year from his death was to elapse before the annuity or any part of it was to become payable: but it was answered on the other side that the action was brought for May's not having done what he ought to have done in his life-time, so that it *might* have been done within the year. And Mr. Justice Dennison declared his opinion to be, in which opinion the other judges fully coincided, that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. That a contingency was not within it, nor any case that depended upon a contingency. And that it did not extend to cases where the thing might be performed within the year.

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The learned judge then cited a case of *Peter v. Compton*, as reported in *Skinner*,^(h) which case was stated by Mr. Northey, in arguing the case of *Smith v. Westall*,⁽ⁱ⁾ as follows: "The agreement was, that A, in consideration of 5*l.* paid by B, should pay to B 20*l.* upon his day of marriage; which promise was not in writing; and it was held by the judges at Serjeant's Inn, to be out of the intent of the statute, and good, because it *might* have been performed within the year. Holt, Ch. J. agreed, that if the marriage had taken effect within the year, no writing would have been necessary; but, as the marriage did not happen within the year, but nine years afterwards, he was of opinion that the promise ought to have been in writing; because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year. But the majority of the judges were of opinion, that it was not within the statute of frauds.

To the same effect is the case related by Lord Ch. J. Treby, according to the report in *Salkeld*, which case was as follows: "A parol promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years after the promise made; and whether this parol promise was void by the statute of frauds, was the question before

(h) 333.

(i) 1 Lord Raym. 316.

all the judges. And they were of opinion, that this was a good promise, and not within the clause of the statute, which provides, that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless it be in writing; for that by possibility the ship *might* have returned within the year. And though by accident it happened not to return so soon, yet *they were of opinion that the said clause of the statute extended only to such promises where, by the express appointment of the party, the thing was not to be performed within the year.

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PART IV.

Contracts in consideration of Marriage.

That promises to marry are out of the statute, which extends only to promises made in consideration of marriage.

SOON after the making of the statute of frauds, we find an opinion in the books,^(k) that the clause relating to marriage extends as well to a promise to marry, as to the payment of marriage portions; but this doctrine has been expressly denied by later resolutions, and the settled construction appears now to be, that mutual promises to marry are out of the statute, which extends only to promises made in consideration of marriage. Thus, in a note to *Harrison v. Cage*,^(l) it is said to have been ruled at the preceding Norfolk assizes, by Lord C. B. Ward, that the promise to marry had no need to be in writing, by the statute of frauds. And Mr. Northey said at the bar, that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Holt, Ch. J. which Holt did not deny. But in *Cork v. Baker*,^(m) this point was expressly in judgment. The plaintiff declared on the defendant's promise to marry her, and obtained a verdict. The defendant moved in arrest of judgment, that this parol promise was not good in law; but after argument it was held that this was not a promise within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage.

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On this clause of the 4th section, the effect of letters from parents, or persons *in loco parentis*, containing promises of *provisions, have been a frequent subject of adjudication, and wherever

(k) Lev. 65, 411. (l) 1 Lord Raym. 386. (m) 1 Strange, 34.

they have been explicit in their terms, and the subject matter of the promise has been reduced to sufficient certainty, they have been held to satisfy the statute. Thus, in a case determined a very few years after the statute was passed,⁽ⁿ⁾ where a father wrote a letter, signifying his assent to the marriage of his daughter with J. S. and that he would give her 1,500*l.* and afterwards by another letter, upon a further treaty concerning the said marriage, went back from the proposals of his first letter; and again, at some time after, declared that he would agree to what was proposed in his first letter; the letter was held a sufficient promise in writing, within the statute of frauds, and that the last declaration had set up the terms of the first letter again.

To the like effect was the observation of Lord Macclesfield, in the case so often alluded to, of *Seagood v. Meale*.^(o) His Lordship, however, in that observation, laid some stress upon the operation of the letter, as an encouragement to the party to marry; and in the case of *Ayliffe v. Tracy*,^(p) this operation as influencing the intended husband to conclude the match, was, according to the report of that case in *Peere Williams*, considered by the same Chancellor, as necessary to the obligatory effect of the letter, within the statute of frauds. The case as stated by the above reporter, was as follows: the plaintiff courted one of the daughters of Sir Thomas Haslewood, and treated with the father about the marriage; the father consented to the marriage, and wrote to his daughter intimating, that he had met the plaintiff, Mr. Ayliffe, and had agreed to give him as a portion 3000*l.* which the plaintiff (he said) seemed fully to assent to, and that they were to meet the next day, when the affair was to be fully concluded; and subscribed his name to the letter. Accordingly, the father and intended husband met and agreed to the marriage, and the father gave money to the daughter to buy her wedding clothes, and the wedding-day having been appointed, the father died before that day, having made his will long before this treaty for the marriage, and given his daughter only 2000*l.* the daughter did not show this letter to her intended husband, whom she afterwards married; and the 2000*l.* was paid to the plaintiff, the husband, but he made no settlement, nor was he required to make any on his wife. The Lord Chancellor was of opinion,

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(n) 2 Vent. 361, *Bird v. Blosse*. (o) *Prec. Chanc.* 560. (p) 2 P. Wms. 65.

that these circumstances amounted to nothing more than a mere communication, and had no ingredient of equity ; the husband, his Lordship said, had made no settlement ; he did not know of this letter, it being written to his daughter ; and that, therefore, he could not be supposed to have married in confidence of this letter ; that he had accepted the 2000*l.* legacy as the portion, and at that time had demanded no more ; and that the other daughter had but 1500*l.* portion.(*q*)

It does not appear that this case supposes any necessity that the facts should supply evidence of fraud, or artifice, in bringing about a marriage by false assurances, in respect to the portion (which will of itself take a case wholly out of the statute, and entitle a party to a performance in equity of a promise not in writing) but it seems to be in analogy with the decision of the Court of King's Bench, in the case of *Wain v. Warlters*,(*r*) which has been so much above considered ; for if, according to the definition given by Chief Baron Comyns, of the word 'agreement,' quoted by Lord Ellenborough, there ought to be the assent of two or more minds to constitute its perfection, or if, according to the words of Lord Ellenborough himself, in the abovementioned case, an agreement in its proper and correct sense signifies a *mutual* contract on consideration *between* two or more *parties* ; this letter, though written to a person interested in the performance, yet, not being sent or communicated to that party, from whom the consideration moved, and with whom alone there could be a reciprocity of undertaking, and mutuality of confidence, seems to have ranked under too loose a description of promise to satisfy the exigency of the principle upon which the determination in the abovementioned case was founded.

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Upon a somewhat similar principle, where an uncle by letter promised his niece 1000*l.* portion ; but in the same letter, dissuaded her from marrying the person intended, the Lords Commissioners(*s*) would not decree the payment, but left the plaintiff to his action at law.(*t*) But it is not so easy to account for the determination by the same judges in the same term, in the case of *Cookes v. Mascall, et c contra*,(*u*) which case was as follows : a marriage was in treaty between the plaintiff Cookes and

(*q*) See this case very differently reported in 9 Mod. 3. (*r*) 5 East, 10. (*s*) Rawlinson and Hutchins. (*t*) Douglas v. Vincent, 2 Vern. 202. (*u*) 2 Vern. 200.

the defendant Mascall's daughter, it being pretended that Sir Thomas Cookes would make a considerable settlement on the plaintiff his kinsman : proposals were made for mutual settlements, and it was thereby agreed, that Mascall should settle 40*l.* *per ann.* for the present, and that Edward Cookes the father, should settle the reversion of his estate at Wick, after the death of him and his wife, and should allow his son 20*l.* *per ann.* for maintenance in the mean time, and Mascall was to settle reversions of copyholds after the death of himself and his wife, of the value of 80*l.* *per ann.* In 1684, a meeting was appointed, and held at Worcester, in order to a full agreement ; the proposals were then considered, and all parties seemed to allow and approve thereof. In October, 1684, Cookes' the father, with one Baker an attorney, came over to Mascall's house at Fordebigg, in order to make a final arrangement touching the settlement to be made on the intended marriage. Mr. Baker having conversed with both parties, proceeded to draw the agreement into articles in writing to be mutually signed by the parties ; but before the same were ready for execution, Mascall and Cookes disagreed ; and Mascall by his answer swore *positively, that upon reflecting that Sir Thomas Cookes had refused to make any settlement on his kinsman, as it was pretended he would, and that Cookes the father, also refused to settle a further estate upon the plaintiff, to answer the reversion that Mascall was to settle, expectant on the death of his mother, he refused to proceed any further, in order to perfect the agreement, and never signed it. But Cookes put up what Baker had written into his pocket, and so they parted, and had no further meeting nor treaty ; but Cookes the father swore, that after the articles were drawn, they were read over and agreed to, and that Mascall promised to meet at another time to execute ; that young Cookes was afterwards permitted to come to Mascall's house, and in December, 1684, married his daughter, Mascall being privy to it, helping to set them forwards in the morning, and entertaining them, and seeming well pleased with the marriage, upon their return to his house at night. Upon this case, Cookes the father, having by his answer offered to perform the agreement on his part, the court *thought fit* to decree Mascall also to perform the agreement, according to what was contained in the writing drawn by Baker, though that was not signed by Mascall, as was intend-

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ed it should have been, nor any other agreement reduced into writing.

It may be worthy of observation, that the expression of 'the court thought fit,' used by the reporter, Mr. Vernon, savours of something bordering upon dissatisfaction ; and, to be sure, the decision seems not to be in perfect consistency, either with the general effect of the cases upon this subject, or with the particular authority of *Douglas v. Vincent*, decided in the same term by the same Commissioners. Lord Macclesfield, in the important case of *Montacute v. Maxwell*,^(x) seems to have manifested a greater regard to the apparent intention of the legislature in this provision of the act. Which case merits the particular consideration of the reader, under the several aspects it presents in the different reports of it.

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*The plaintiff brought a bill against the defendant her husband, setting forth, that the defendant, before her intermarriage with him, did promise that she should enjoy all her own estate to her separate use, that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there, it might shame him ; but engaged upon his honour she should have the same advantage of the agreement, as if it was in writing, drawn in form by counsel, and executed ; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant, her husband, putting him in mind of his promise, to which the defendant her husband, wrote her an answer, under his hand, expressing that he was always willing she should enjoy her own fortune, as if sole, and that it should be at her command.

To this bill the defendant pleaded the statute of frauds and perjuries, by which " all promises in consideration of marriage, unless signed in writing by the party, are made void ;" and averred that he never signed any promise or agreement before marriage, for her enjoying any part of her estate separately, which he pleaded in bar of any relief or discovery.

It was urged against this plea, that this promise was on the plaintiff's side, executed by her intermarriage ; and was, there-

(x) 1 P. Wms. 618.

fore, like the several cases in which equity did relieve and compel a mutual execution; that the letter written by the defendant, though after marriage, was an evidence under his hand of the agreement before the marriage, and so took it out of the statute.

On the other side, it was said, that the express words of the statute made all such promises in consideration of marriage void, unless they were in writing, signed by the parties; and that there was the greatest reason for it, since in no case *could there be supposed so many unguarded expressions and promises used, as in addresses in order to marriage, where many passages of gallantry usually occur, and it was therefore provided by the statute, that all promises made in consideration of marriage, should be void, unless signed by the party. That it was very wrong to call marriage the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore, to say that the marriage was an execution which should render the promise good, was quite frustrating the statute; which the court took notice of and approved.

And the Lord Chancellor declared, that in cases of fraud, equity should relieve, even against the words of the statute: as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this, or such like cases of fraud, equity would relieve; but when, as in the case before him, there was no fraud, but only a reliance upon the honour, word, or promise of a party, the statute making those promises void, equity would not interfere; nor were the instructions given to counsel for preparing the writings material, since, after they were drawn and engrossed, the parties might refuse to execute them, and as to the letter it consisted only of general expressions; as, "that the estate should be at the plaintiff's command, or at her service; indeed, had it recited or mentioned the former agreement, and promised the performance thereof, it had been material; but as this case was circumstanced, the plea should be allowed: and as the plea was in bar of a discovery as to all matters, which if discovered and admitted might be barred by the statute, so far might the statute be pleaded in bar of such discovery. But according to

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The marriage itself is no part-performance within this clause.

If one agreement in writing is proposed, and another is fraudulently executed, equity will relieve.

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That a parol promise on marriage is a sufficient consideration to support a settlement made agreeable to it after marriage, or to establish a promise made in writing after marriage.

the report of the same case in *Strange*,^(y) the plaintiff afterwards amended her bill, by further charging, that in order to induce her to marry him, without a previous settlement, and to secure the *performance of his promise, in executing it afterwards, the husband had promised to take the sacrament on it, and that he did take the sacrament on the marriage accordingly. That after the marriage he wrote a letter, wherein he promised to make such settlement, and that he was ready to sign the writings, according to her desire. To this he confessed that he did take the sacrament, but said, he did it only in compliance with a custom established in the parish church (of which he was a member) of receiving the sacrament on their marriages, and not to give any sanction to this pretended agreement: and as to the letter, that he did not remember the particulars; but if he had written any thing concerning his readiness to sign any writings, it only related to some proposals he had made of settling a sum of 1,500*l.* on her, and which he did soon after sign. He then pleaded the statute of frauds and perjuries again. But the Lord Chancellor was of opinion, that the case was very much altered by these new circumstances. That at first it stood purely on the parol promise before marriage; upon which there was no colour to relieve the plaintiff. But that such parol promise on marriage was a sufficient consideration, to support a settlement made agreeable to it after marriage. That this has been frequently determined; that it was also a sufficient consideration to establish a promise made in writing after marriage; that there was great evidence of such a promise made in writing after marriage; the defendant did not deny his writing, but declared himself ready to execute the writings as she desired; he avoided it, however, by saying, that they referred to proposals of settling 1,500*l.* which was impossible, because it appeared that she never desired any such settlement. And though he had said he had signed that settlement, it did not appear when he did it; and his Lordship was very suspicious that he had done it since the amended bill. His answer to the charge of receiving the sacrament, in confirmation of his promise, was not at all satisfactory. He could have no occasion to promise receiving the sacrament, but on that account; and though he might receive it

in compliance with the custom of his church, yet that was ^{very} consistent with his laying hold of that solemn act of devotion, to testify his sincerity. The plea was ordered to stand for an answer.

According to the report of the same case, in Eq. Ca. Abr.(x) the husband privately countermanded the instructions given by him for drawing the settlement, and then drew in Lady Montacute to marry him, and from the loose statement in Precedents in Chancery,(a) it seems that some such decided act of fraud was imputable to the defendant. For the Chancellor is there represented to have said, that if the parties rely wholly upon the parol agreement, neither party can compel the other to the specific performance, for the statute of frauds is directly in their way.

But that if there is any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, this court will, in such case, give relief; as where instructions are given, and preparations made, for the drawing of a marriage settlement; and before the completion thereof, the woman is drawn, by the assurances and promises of the man to perform it, to marry without a settlement.

If instructions are given and preparations made for drawing the marriage settlement, and the woman is drawn in to marry upon the assurances of the man, without the settlement's being executed, equity will relieve.

We perceive in this case, under the different views which the books give us of it, an anxiety in the court to prevent the statute from being enervated by dangerous exceptions; and we must regard the decision as wholly proceeding on the proof of actual fraud. It was fully seen, that if the marriage could be considered as an execution of the contract, to take the case out of the statute, this clause of the statute would be made a perfect nullity. For it is clear, that the compulsory execution of the supposed agreement could never be called for in equity, until the marriage, which was the only consideration of making it, and without which it could have no application, was celebrated, so that if the celebration of the marriage were an answer to the statute, the clause could never be enforced, since the exceptions out of it would always arise together with the occasions for its application. In a ^{case} determined a few years afterwards,(b) the same doctrine on this subject was maintained. On the marriage of

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(x) 1 Eq. Abr. 19. (a) Prec. in Chan. 526. (b) Sansum v. Butter, reported in 1 Bac. Abr. 119, Edit. Gwyllim. Tit. Parol Agreements.(C)

the plaintiff with the defendant's daughter, the defendant promised to give her 450*l.* portion, and accordingly paid the plaintiff 200*l.* in part, but took a bond from him for it, till a suitable settlement should be made, and the defendant himself gave particular directions concerning the settlement, which was drawn accordingly and engrossed; but before it was executed, the plaintiff's wife died, and the bill was brought to have the 200*l.* bond delivered up, and the remaining part of the portion paid; the defendant pleaded the statute of frauds and perjuries, the agreement not having been reduced to writing, and signed by the parties; and by way of answer, denied that the 200*l.* was paid in part of the portion, but said that it was lent to the plaintiff, and that the bond was given for securing the re-payment. The plea was allowed, notwithstanding it had been insisted that the agreement was executed by the marriage; for that if the marriage should be looked upon as an execution of the agreement on one side, so as to take the case out of the statute, it would entirely evade it; for that all promises of this kind suppose a marriage either already had, or to be had. The authority of these cases, and the rational grounds on which they proceeded, seem not to have been broken in upon even at times when the doctrine of part-performance has been most favourably received by the courts, and may now, it is conceived, be considered as out of controversy.

But though these parol promises made before and in consideration of marriage, fall obviously within the statute of frauds, and as the authorities decisively show, ought not be taken out of it, by any evidence in proof of their solemnity and repetition, or by the preparations made, or directions given, for carrying them to their accomplishment, or by the consequential fact of the marriage; yet it appears *from the expressions of Lord Chancellor Parker, in the above case of *Montacute v. Maxwell*, as reported in *Strange*, that a verbal promise on marriage is a sufficient consideration to support a settlement made agreeable to it after marriage. And his Lordship added, that it had been frequently so determined. The indulgent inclination of the courts of equity towards these settlements after marriage, has carried them a great way; for the inference from this doctrine is, that the consideration for these settlements after marriage, derived from the existence of these prior agreements, does not depend upon the

legal obligation to the performance of these agreements, since the statute has made them remediless. Substantively, they have no validity, but in this auxiliary light they are capable of giving validity to what would be incapable of standing alone against the claims of creditors or purchasers, provided the verbal promises proved, and the settlement made, discover a clear correspondence. In a case, indeed, in which there was a double infirmity in the promise made before marriage, the same effect was given to it. In *Lavender v. Blackstone*,^(c) a promise made by an infant on his marriage, to settle his estate when of age, was held a sufficient consideration to support the settlement after marriage made in pursuance of such promise. And in the late case of *Dundass v. Dutens*,^(d) the Chancellor was of opinion in favour of the settlement against the husband's creditors, notwithstanding it was urged at the bar, and admitted by the court, that a parol agreement, previous to marriage, is absolutely void, and that a subsequent marriage is not a part execution of such an agreement to take it out of the statute of frauds and perjuries.

*PART V.

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On Promises by Executors and Administrators.

THE first branch of the 4th section of this statute enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

It seems proper to premise, that to bring the party within the protection of this provision of the statute, he must be actually invested with the office, at the time of making the promise: he can receive no benefit from it, by acquiring the office after the promise has been made by him; for which, if it were not clear enough upon the words of the statute, the case of *Tomlinson v.*

That to bring the party within the protection of this provision of the statute, he must have been actual executor or administrator, when he made the promise.

(c) 2 Lev. 146. (d) 1 Vez. jun. 196; and see *Pitcairn v. Ogbourne* 2 Vez. 375; see also *Shaw v. Jakeman*, 4 East, 201.

Gill^(e) is an authority. As an immediate executor derives all his title from the will of the person he represents, and the interest and office are completely vested in him, at the instant of the testator's death, his promise is prevented by this statute from binding him personally, though he makes it before probate, which is not the origin but the authentication of his title. But an administrator derives his office and interest from the ordinary, and, therefore, a verbal promise by a person, in virtue of his expectation of representing an intestate, is not invalidated by this clause of the 4th section; and though the grant of administration has relation to the time of the intestate's death,^(f) such relation cannot, it is presumed, affect the application of the statute.

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In an early part of this work, some comments were introduced to show that the statute of frauds and perjuries, in "super-adding the necessity of writing, to give an actionable effect to the promises therein specified, has given no positive virtue to the writing itself, so as to make it a substitute for the consideration necessary to support the promise according to the ancient maxims of our municipal law. The judgment of C. B. Skinner, in the House of Lords, in the case of *Rann v. Hughes*,^(g) was upon that occasion presented to the reader,^(h) which arose upon a promise in writing, made by executors, and wherein the Chief Baron, in very clear terms, made it appear, that this branch of the statute, being made for the relief of personal representatives, did not certainly intend to charge them further than by common law they were chargeable. To that judgment the reader is again referred as a satisfactory argument for this construction of the statute.

The statute has made no alteration in the mode of pleading; therefore, though the promise is in writing, the declaration must still set forth the consideration; though it is not necessary to show that the promise was in writing.

To the comments of the Chief Baron it may be added, that there not only exists as much necessity since the statute for a consideration to support a promise, though made in writing, but the consideration also continues to be an essential part of the allegations in the declaration in an action upon such promise. For the statute has made no alteration in the method of pleading, either by addition or defalcation, so that as on the one hand the consideration continues necessary to be stated agreeably to the rule at the common law, so on the other it is not held to be necessary on account of the statute to show by the declaration that

(e) Amb. 330. (f) 2 Roll. Abr. 554. (g) 7 T. R. 350, N. (a.) 7 Bro. P. C. 556, S. C. (h) Vid. supra p. 8, et seq.

the promise was in writing; but it is left to evidence; which last mentioned point rests upon the general rule, distinguishing between the cases wherein a matter has its origin in an act of parliament, and is thereby required to be in writing, and where an act of parliament makes writing necessary to a matter existing at common law; in the latter of which cases, the thing need not be shown in pleading to be in writing, but in the former, it must be pleaded with all the circumstances required by the act.⁽ⁱ⁾ Thus a will must be pleaded to be in writing, upon the statute of Henry VIII. for by that statute the power of devising is in certain cases first given, and it is by virtue of that act, consequentially enlarged by the statute of 12 Car. 2, that we now exercise the testamentary power over real estate.^(88a) The result is, that a

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(i) 2 Salk. 519; and see 3 Burr. 1890, per Yates Justice.

(88a) It has generally been holden, however, upon the several branches of the 4th section of the statute, that though a plaintiff need not in his declaration show any note in writing, but that it will be sufficient for him to produce it on the trial; yet that if such promise be pleaded in bar of another action, it must be alleged to be in writing, so as that it may appear to be a contract on which an action will lie. Thus in a case which took place a very few years after the statute was passed,[†] the plaintiff declared an *indebitatus assumpsit* for 20*l.* for meat, drink, washing, and lodging, for the defendant's wife, provided for her at the request of the defendant; the defendant pleaded, that after the making of the promise, &c. and before the exhibiting of the plaintiff's bill, it was agreed between the plaintiff and defendant, and one J. B. his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife, then in the plaintiff's custody, and that the plaintiff should accept the said J. B. the son, for her debtor for 9*l.* to be paid as soon as the said J. B. should receive his pay due from his majesty to him as lieutenant of the ship, called, &c. in full satisfaction and discharge of the premises in the declaration mentioned, and averred, that the plaintiff at the same time did deliver to the defendant the said clothes, and that she accepted the said J. B. the son for her debtor for the said 9*l.* and that the said son agreed to pay the same accordingly; and that the said J. B. afterwards, and as soon as he received his pay as aforesaid, viz. on such a day, was ready, and offered to pay the 9*l.* and the plaintiff refused to receive it, *et hoc paratus*, &c. to which plea the plaintiff demurred, and judgment was given for the

But though the declaration need not state the promise to have been in writing, if such promise is pleaded by the defendant, the plea should show it to have been in writing.

[†] Elizabeth Case v. James Barber, Sir Thom. Raym. 450.

* promise, to charge an executor personally, and in his own right, so as to make him liable to pay out of his own property, must not only be in writing, but founded upon a sufficient consideration in law, which authentication by writing must be proved by the production of the writing itself, and which consideration must be both proved and stated.

plaintiff for two reasons : 1. Because it did not appear that there was any consideration for the promise on the son's part : 2. Admitting that there *was* a consideration, yet, that by the statute of frauds and perjuries, the agreement ought to be in writing, or the plaintiff could have no remedy thereon ; and though upon such an agreement the *plaintiff* need not set forth the agreement to be in writing, yet when the *defendant* pleads such an agreement in bar, he must plead it so that it may appear to the court, that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

The case of Villers v. Handley, in the Common Pleas,† proceeded upon the same doctrine upon the 3d section of the statute, which enacts, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act or operation of law. The action was debt upon a bond for 52*l.* 16*s.* against the heir of the obligor ; the defendant confessed the bond and debt, but pleaded that he had nothing by descent, but a small cottage in T. except a reversion after a term of 500 years, commencing the 16th of October, 1746, then to come, and unexpired, and *hoc paratus*, &c. to which plea there was a general demurrer ; and for the plaintiff it was objected, that the plea was ill in substance, because it was not alleged therein, that the lease for 500 years was *in writing*, (according to the book, because it was not by *deed*, which seems to have proceeded upon a mistake of the law ; and see the same book, page 26, Farmer on dem. Earl v. Rogers) and because, if the lease was not in writing, it was void by the statute of frauds and perjuries, and of this opinion was the court, (Clive and Bathurst, Justices, being present) and upon this point they gave judgment for the plaintiff.

† 2 Wils. 49.

*But in order to charge the executor or administrator *de bonis propriis*, it is not necessary to aver in the declaration that the defendant has assets, for if the promise be in writing, and supported by a consideration, as forbearance to prosecute at the request of the defendant,(89) the plaintiff, by acquiescing *in a possible

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(89) In William Banes' case, 9 Rep. 93, b. it was clearly held, that the declaration was good enough, without saying that the defendant had assets, for it shall be intended *prima facie*, that she had assets. But Coke said, that he conceived the truth to be, that if there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time, she might have given it in evidence. But this last position seems not to be law, according to the cases, see 1 Roll. Abr. 24, pl. 33, 2 Lev. 3. Davis v. Reynier, Yelv. 11. Goreing v. Goreing, 1 Vent. 120. Davis v. Wright, Cro. EL 91. Trewinian v. Howell, 1 Vez. 126. Reece v. Kennegac. But it seems clear enough that the executor must be liable, and that there must be an existing debt, otherwise there will be no consideration. An executor so closely represents the person of the testator, that if a man executes a bond, his executors are bound, though they are not named; therefore, in a declaration against the executor upon the bond of the testator, it is not necessary to say, that the obligor bound himself and his executors; but if the suit was against the heir, it would be a material allegation to say, that the ancestor bound himself and his heirs, and to prove that he did so in fact; for the heir is not bound by his ancestor's bond, unless he be expressly named. If, therefore, the declaration omits to state that the heir was bound, it is substantially defective; and by the case of Barber v. Fox, 2 Saund. 136, it appears that this is such a defect as a verdict cannot cure; for unless it be shown upon the pleadings, that the heir was bound, there will appear to have been no consideration for his promise, and so no sufficient cause of action. Thus also, if the heir promise to pay a simple contract debt of the ancestor, no action will lie upon this promise, inasmuch as it is without consideration, for the heir is not chargeable upon such debts of his ancestor. Cro. James, 47, Fish v. Richardson. But if an executor promise to pay, in consideration of a consent only by an assignee of a debt not to sue, the promise stands upon a sufficient consideration, 1 Roll. Abr. 20, pl. 11. And so doubtless I conceive the heir, under the same circumstances, will be liable, if the debt be founded upon a specialty.

What allegations necessary to be made in the pleadings in actions on the special promise of executors & administrators.

In Forth v. Stanton, 1 Saund. 210, there was no allegation of any undertaking to forbear on the part of the assignees; which case was thus.—Plaintiff declared that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and that the defendant,

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detriment to himself, by his relinquishment of legal proceedings (for he might at least have obtained a judgment of *assis quando acciderint*) has purchased a title of action upon the undertaking of the defendant. But without such special agreement, in which the executor steps out of his representative character, an action cannot be sustained against an executor, otherwise than as an executor, and if the action is brought against him in the character of executor, to recover a demand out of the testator's estate, *any special promise to pay the testator's debt is a mere *nudum pactum*, if there are no assets, and if there are any, the extent of the promise is measured by the extent of the assets, or in other words, the promise superinduces no obligation upon the original representative liability. Since the case, however, of *Wain v. Warlters*, and more particularly *Egerton v. Matthews*, already so much discussed, it seems that the writing, to be valid, within the 4th section of the statute, should, in the case of such promise made by an executor, not only state the consideration whether it be forbearance of suit, or whatever else, in terms, but that the undertaking on both sides should be comprised in the agreement, so as to make it a subject of action to either party; for it was intimated by the Chief Justice, in the first-mentioned case, that 'the obliga-

in consideration that the plaintiff would accept the defendant for his debtor, promised to pay the debt to the plaintiff. And for want of alleging a sufficient consideration for the promise, the declaration was judged insufficient. Upon the principle of the determination in *Barber v. Fox*, cited above in this note, it seems that a verdict for the plaintiff could not have cured this radical defect: but in the case of *Roe v. Haugh*, 1 Salk. 29, which was the converse of the last-mentioned case in its circumstances, and the relative situation of the parties, the verdict was held by four judges against three to have cured the omission to allege a sufficient consideration in the declaration. There, in consideration that the plaintiff would accept C to be his debtor for 20*l.* due to him from A, in the place of A, C promised and undertook to B to pay to him the 20*l.*; and this was adjudged good, after a verdict, without express averment that A was discharged; for the majority of the judges in the Exchequer Chamber held, that being after verdict, they ought to do what they could to help it, and that, therefore, they would not take it as a promise only on the part of C, because, as such, it could not bind, unless A was discharged; but they construed it as a mutual promise, viz. that C promised B to pay the debt, and B promised in consideration *inde* to discharge A.

tory part of the transaction was indeed the promise, which will account for the word promise being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood the *agreement in respect of which the promise was made*, must be reduced into writing.*

PART VI.

On collateral Promises.

BY the 2d clause of the 4th section of the statute, it is provided that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party, to be charged therewith, or some other person thereunto by him lawfully authorised."

In entering upon this branch of the statute, it may be of importance in the first place to inform the student, that what *was said in the preceding part of this chapter, relative to the necessity of a consideration to make the promise binding, notwithstanding a compliance with the statute as to the circumstance of writing, applies with equal propriety to the subject of the present examination; for the statute, as was observed, has made no alteration in the common law requisites, by superadding a further constituent of the validity of a promise under certain circumstances; and as appears from a multitude of authorities, these collateral promises were mere *nuda pacta*, before the statute, unless they were supported by a consideration, which consideration it was also necessary to set forth upon the pleadings. If A, therefore, promise in writing to B, that in consideration he will sell goods to C, if C does not pay for them, A will himself pay for them, this is an actionable undertaking, since the statute, because it was made in writing, and was founded upon a consideration sufficient for its support before the statute.(k) It will be unnecessary to say any thing more on the contents of the written agreement, which by

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(k) 1 Roll. Abr. 27, pl. 49. 2 Str. 873, King v. Wilson.

the cases of *Wain v. Warlters*, and *Egerton v. Matthews*, has been laid under a severer requisition than, according to former opinions, perhaps, it was considered as being subject to, as the doctrine of those cases has been already much considered. I shall, therefore, pass on to the examination of the circumstances and qualities which constitute the particular species of promise or undertaking, in the view of this clause of the section; and these appear principally to regard the *liability*—the *consideration*—and the *promise itself*; for, First, it seems that there must be a liability in the original party to the payment of a debt, or the performance of some act, existing and ascertained at the time of making the collateral promise. Secondly, the consideration of the collateral promise must have immediate respect to the liability; and, Thirdly, it should appear that the collateral promise was made to the person to whom the original party was immediately liable, and to do the same thing which the original party was liable to do; and if the payment of a debt be the object of a promise, *the payment thereof should appear to have been promised in prospect of the final discharge of the original debtor, and not by way of substitution and purchase.

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If the person for whose use goods are furnished at the request of a third person, the promise of such third person to pay the debt must be in writing, and it is not material whether the promise was before or after the delivery of the goods.

Mr. Justice Buller, in the case of *Matson v. Wharam*,⁽¹⁾ laid down the rule as to the liability of the person for whom the promise is made, thus, "the general line now taken is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds." Which rule, although the terms of it have reference only to the circumstances of the case in which it was promulged, has been confirmed to by subsequent authorities, as a general principle for the construction of this provision of the statute. The purpose of stating the rule as above, in the case just alluded to, was to answer the point contended for by the counsel for the plaintiffs, on the authority of *Jones and Cooper*,^(m) where a distinction had been taken between a promise for the payment of goods for another person *before* delivery, and *after* delivery, the former having been held by Lord Mansfield to be an original undertaking, and so not within the statute of frauds, but the latter a collateral undertaking, and consequently falling within the statute. It was

(1) 2 T. R. 80.

(m) Cowp. 227.

upon this occasion, said by Mr. J. Buller, "I argued the case in Cowper, the facts of which were, that a person who was going abroad, wished to make some provision for his mother-in-law, in his absence, and said to a baker, you must supply my mother-in-law with bread, and I will see you paid;" that case was tried before Nares, J. at Bristol. I was for the plaintiff, and cited the case of *Mawbray v. Cunningham*,⁽ⁿ⁾ in which Lord Mansfield said, "this is a promise made before the debt accrues; and what is the reason of the tradesman's requiring that promise? It is because he will not trust the person for whose use the goods are intended;" and the plaintiff obtained a verdict. But Nares J. overruled this determination, and nonsuited the plaintiff, and this court afterwards refused to grant a new trial."

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But with all due respect for the above observations of the learned Judge, it is impossible to help remarking, that the case of *Jones v. Cooper* seems not to have overruled the determination in *Mawbray v. Cunningham*, for though in both cases the promise was made before the delivery of the goods, yet in the case at *nisi prius*, determined by Lord Mansfield, the promise was simply to see the goods paid for; whereas, in *Jones v. Cooper*, the promise was expressly conditional, as thus, "I will pay you if Smith will not;" and Smith was entered the debtor in the plaintiff's books. And upon this distinction, as it appears by the report in Cowper, the new trial was refused; and Lord Mansfield observed, that the general distinction was a clear one; meaning, as his Lordship afterwards made it appear, the distinction between an undertaking before the delivery of the goods, and afterwards; but, said his Lordship, there may be a nicety where the undertaking is *before* delivery, and yet *conditional*; and upon this sub-distinction between promises conditional and promises unqualified, made before delivery, it appears that the case of *Jones v. Cooper* was in reality decided. But the distinction upon which *Mawbray v. Cunningham* was decided by Lord Mansfield at Guildhall, was directly overruled by the abovementioned case of *Matson* and another *v. Wharam*, which was an action for goods sold and delivered, and tried before Mr. Justice Wilson, when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case: the defendant Wharam ap-

(n) Sittings after Hilary Term, 1773, at Guildhall.

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plied to Matson, one of the plaintiffs, and asked him if he was willing to serve one R. C. of Pontefract, with groceries ; he answered, that he dealt with nobody in that part of the country ; and did not know R. C. to which the defendant, Wharam, replied, "*if you don't know him you know me, and I will see you paid.*" Matson then said, he would serve him ; and Wharam answered, he is a good chap, *but I will see you paid.* A letter was afterwards received by the plaintiffs from R. C. containing an order for "goods, to the amount of 7*l.* and the goods were sent according to the order. The plaintiffs made R. C. the debtor for these goods in their books. They afterwards applied to R. C. by letter, for payment of the debt, and receiving no answer, they then applied to the defendant, Wharam, who refused to pay, and there having been no promise in writing, according to the statute of frauds, judgment was given for the defendant.

We observe, that in the case just considered, although the promise was not conditional in expression, yet that the circumstances sufficiently imported an understanding among all the parties, that both the party for whose use the goods were delivered, and the party expressly promising to pay, were to become liable. Such liability, therefore, of the person on whose account the promise is made, is an essential point of inquiry, and must be gathered from the circumstances of the case, as is strongly instanced in the case of *Anderson, v. Hayman*,^(o) which it will be necessary to give the reader a pretty full account of, to assist his comprehension of this critical subject.

The plaintiff was a woollen-draper in London, and employed one Biffin as a rider, to receive orders from his customers in the country. The defendant meeting with Biffin at Deal, desired him to write to the plaintiff to request him to supply the defendant's son, who traded to the West-Indies, with whatever goods he might want, on his the defendant's credit ; saying at the same time, 'use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as 800*l.* or 1000*l.*' Biffin accordingly wrote to the plaintiff the following letter : 'Mr. Hayman of this town says, his son will call on you, and leave orders ; and he has promised me to see you paid, if it amounts to 1000*l.* N. B. If deal for 12 months credit, and

(o) 1 Hen. Blackst. 120.

pay in 6 or 8 months, expects discount in proportion.' Soon afterwards, the son received *the goods from the plaintiff, to the amount of 800*l.* which was delivered to him in consequence of the engagement of the father abovementioned. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff as follows: "Your favour of the 27th past, has been forwarded to me from Ostend, in answer to which I can only say, that I understood your credit for the goods was twelve months, which was also mentioned by your rider to my father. I shall at this rate make you remittances for the different parcels, as they become due.

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The son afterwards became a bankrupt, and this action was brought against the father to recover the value of the goods.—Mr. J. Heath, who tried the cause, directed the jury to consider whether the plaintiff gave credit to the defendant alone, or to him *together with his son*; that in the latter case, they should find a verdict for the defendant; in the former, for the plaintiff; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the statute of frauds. A verdict was found for the defendant, and a rule nisi was obtained to set it aside; but the court were clearly of opinion, that this promise was within the statute, as it appeared by the letter of Hayman the younger, that credit was given to him as well as to the defendant his father, and the rule was accordingly discharged.

By the subsequent case of *Keate v. Temple*, in the Common Pleas, (p) it appears that, in collecting the true state of the transaction, and ascertaining the fact, whether the party promising intended only to come in aid of the liability of the person on whose account he promised, or to become himself immediately responsible, the court will not only pay attention to the expressions used, but to the particular situation of the defendant at the time of his undertaking; and will compare the amount *of the sum in question with the circumstances of the party. I feel a necessity in these cases, which turn upon such nice particularities in the facts and expressions, to exhibit the circumstances rather more at large than accords with the general plan of the work; and I do not see how the case last alluded to, can be presented with its

That the court in ascertaining the liability of the person undertaken for, will look to the intention as inferrible from the situation, circumstances and general responsibility of the party promising.

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due effect, in an abridged state. The action was brought for goods sold and delivered, and work and labour, with the common money counts, to which the general issue of *non-assumpsit* was pleaded. The cause was tried before Lawrence J. at Winchester summer assizes 1797, when the principal facts in evidence were as follows. The plaintiff was a tailor and slopseller at Portsmouth, and the defendant the first lieutenant of his majesty's ship the *Boyne*. When the ship came into port, the defendant applied to a third person to recommend a slopseller who might supply the crew with new clothes, saying, "he will run no risk, I will see him paid;" the plaintiff being accordingly recommended, the defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" The plaintiff answered, "perfectly so." The clothes were delivered on the quarter-deck of the *Boyne*: slops are usually sold on the main deck: the plaintiff produced samples to ascertain whether his directions had been followed: some of the men said, that they were not in want of any clothes, but were told by the defendant that if they did not take them, he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers. The clothing of the crew in general was light and adapted to the climate of the West-Indies, where the ship had been last stationed. Soon after the delivery the *Boyne* was burnt, and the crew dispersed into different ships on that occasion. The plaintiff having expressed some apprehensions for himself, the defendant said to him, "Captain Grey (the Captain of the *Boyne*) and I will see you paid; you need not make yourself uneasy." After this, the commissioner came on board the *Commerce de Marseilles*, in order to pay the crew of the *Boyne*, at which time the defendant stood at the pay-table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioners to stop the pay of the crew, who answered that it could not be done.

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The learned judge in his directions to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the defendant, as immediately responsible, the plaintiff was entitled to a verdict; but if they believ-

ed that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant, to get his money from the crew, they ought to find for the defendant. Verdict for the plaintiff, 57*l.* 7*s.* 8*d.*

A rule *nisi* for a new trial having been obtained on a former day, on the ground of the defendant's undertaking being within the statute of frauds, the counsel for the plaintiff now showed cause, and contended that the only question in the case had been left to the jury, and decided by them, viz. whether the sailors were liable in the first instance, and the defendant only came in aid of their liability; or whether the defendant was immediately responsible. They said that if the Boyne had been burnt before the delivery of the goods, the plaintiff would have had no communication with the crew, and of course no ground of action against them; if, therefore, they were not liable on the original contract, the subsequent delivery would not shift the credit upon them.

The counsel for the defendant was proceeding to argue in support of the rule, but was stopped by the Court, and Eyre, Chief Justice, delivered his opinion to the following effect:—"There is one consideration independent of every thing else, which weighs so strongly with me, that I should wish the evidence to be once more submitted to a jury. The sum recovered is 57*l.* 7*s.* 8*d.* and this against a lieutenant in the navy: a sum so large, that it goes a great way towards satisfying my mind, that it never could have been in the contemplation of the defendant to make himself liable, or of the slopseller to furnish the goods on his credit, to so large an amount. I can hardly think that, had the Boyne not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his pay-master, but that he would have given the preference to the latter. The circumstances of this case create some prejudices against the defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these clothes against their inclination. But it was in evidence, that though they were pretty well clothed, yet their clothes were adapted to a warm climate, rather than to the service in which they were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know, that a sailor is so singular a

creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the defendant and Captain Grey amounts to this, that when the men were to be clothed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent, that the men were to pay in the first instance; the defendant's words were, "I will see you paid at the pay-table; are you satisfied?" and the answer then was, "perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question *is, whether the sloopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund to giving credit to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum. Considering the whole bearing of the evidence, and that the learned judge who tried the cause, has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.'

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Where there is no liability in the party promised for, the promise is an original one, and subjects the promiser to the common action of *indebitatus assumpsit*.

The principal point is, then, it seems, in all these cases, whether or not the party who is to be benefited by the promise is liable at all, for this is implied in the very notion of a collateral promise; if there is no such liability, there is nothing to which the new promise can be collateral, or in relation to which it can be regarded as an undertaking to answer for the debt, default, or miscarriage of another person. It must, therefore, without such liability in a third person, be an original undertaking in the party promising. And, in a case of this sort, where goods are delivered to one person at the request of another, who alone stands forth as the purchaser and the party responsible, the common action of *indebitatus assumpsit* is the proper remedy against him, without regard to the special promise, the case being out of the statute altogether; and of course no written evidence of the promise is

necessary. But where the undertaking is collateral, by reason of the existing liability, a special declaration on such promise becomes necessary; and if the undertaking was to pay *upon request*, the count must state formally and explicitly, that a request was made; nor will the usual allegation in the common counts, that the defendant did not pay, *although often requested*, in such case, be sufficient.

But a special declaration is necessary where the promise is collateral, and within the statute.

Whether such special mode of declaring is necessary, or not, will depend upon the question, whether the promise was *original* or *collateral*; the point has, therefore, sometimes come under adjudication, not on the statute of frauds, but on the *rules of pleading; as in the case of *Masters v. Marriott*,^(g) where the plaintiff declared in an action of *assumpsit*, that the defendant had sold to him a bay gelding for eight guineas, and that he agreed on the sale, that in consideration the plaintiff had paid to the defendant the eight guineas, he, the defendant, promised to the plaintiff that if he disapproved of the gelding, and delivered it to Barham for the defendant's use, that Barham should repay the said eight guineas, and if Barham did not pay it, that defendant would repay it on request. The declaration then averred, that the plaintiff did disapprove of the gelding, and delivered it to Barham, and requested him to pay the eight guineas, which he refused to do upon request. The plaintiff also declared in another count upon an *indebitatus assumpsit* for another eight guineas, had and received to his use, and concluded that the defendant, not regarding his said several promises, had not, *although often requested*, repaid the said sums, to the damage of the plaintiff. On *non assumpsit* pleaded, a verdict was given for the plaintiff, with *entire damages*; and it was moved in arrest of the judgment, and argued several times, that the promise to repay the eight guineas, if Barham did not do it, was a *collateral* promise to pay in default of another, and that the defendant was not a debtor, but only a surety in default of Barham, and that, consequently, a *special request* to the defendant ought to have been laid, and that a *quasi requisitus fuit* was insufficient; that there should have been a notice, that Barham had not paid, and a special request to the

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(g) 3 Lev. 363; and see 1 Roll. Abr. 27, 30, 32. 1 Roll. Rep. 275-6. Cro. Jac. 386, 500. 3 Bulst. 94. 1 Danv. Abr. 68. 1 Vent. 43, 298, 299, 311. 2 Vent. 36. 1 Salk. 23. 2 Samsd. 136.

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defendant; for the promise of the defendant was, that he would pay it, if Barham did not; and *the damages being entire on the promises in both counts*, it was contended that the plaintiff could not have judgment. But at last, it was resolved by the whole court, that it was not a collateral promise to pay a debt for another, but that the whole was one *entire contract* upon the sale, and was no other in effect, than that the plaintiff bought the gelding conditionally, that if he did not like him, he should receive back his money, and the defendant received the money upon the same condition; and that when the condition was performed by the disapproval of the gelding, and the returning of it to Barham, the contract was void and at an end, and the money was in the hands of the defendant as a debtor to the plaintiff as for money received to the plaintiff's use, and Barham was no more than a servant to receive the gelding, and to repay the money; and that by *his* not paying it, the plaintiff, as master, was the debtor. Wherefore, judgment was given for the plaintiff upon the *whole* declaration, the count upon the *indebitatus assumpsit* being considered as good and sufficient upon the foregoing reasons, and this judgment was afterwards affirmed in error.

Here we observe, that the statute of frauds was not in question, the undertaking probably having been in writing; but the precise point could not have been more directly raised upon the statute, than it was in this instance upon the principles of pleading. The necessity for the actual liability of the person undertaken for, was the precise point of the case of *Harris v. Huntback*(r) wherein the promise appeared to be in writing, but upon the same rule in pleading of showing *especially* the collateral promise, and not relying upon the common *indebitatus assumpsit*, a similar doctrine upon the statute of frauds was established. The cause came before the court upon a case reserved for their opinion in an action upon a general *indebitatus assumpsit*, in which the plaintiff declared upon two counts; the 1st whereof was for money lent and advanced by the plaintiff at the defendant's request; the 2d was for money laid out and expended by the plaintiff at the defendant's request: and the question upon the case stated was, whether the evidence supported the declaration. On

(r) 1 Burr. 371.

the first count, the evidence produced was a note of the defendant's, in the following words: "3d December, 1751, Then received of Mr. Harris the sum of 19*l*. on behalf of my grandson, *which I promise to be accountable for on demand. Witness my hand, S. Huntback."

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On the 2d count, the evidence was, that one Davidson, coming to the plaintiff by the defendant's order, for money to pay workmen, the plaintiff refused to pay the money unless the defendant would sign a receipt. Whereupon the defendant wrote the following note: "Mr. Harris, at the earnest request of the gardener, the workmen wanting money greatly for the work at the woodhouses, this is to certify, that at my request you pay to Mr. Davidson, on the account of Master Hillier, for the workmen's use, the sum of 15*l*. as witness my hand, S. Huntback." And a receipt was given by the said Davidson the gardener, to the plaintiff, on the plaintiff's paying him this 15*l*.

It was contended, on behalf of the defendant, that *indebitatus assumpsit* would not lie upon a collateral undertaking; but it was clearly determined by the court, that as there was no remedy against the infant, it was an *original* and not a *collateral* undertaking; and *Buckmyr v. Darnall*,^(*) was cited, wherein it was agreed, that where no action will lie against the party himself, undertaken for, it is an original promise. According to which case of *Buckmyr v. Darnall*, it seems not only necessary that the party for whom the promise is made should be liable, but that he should be or become liable at the time of the promise being made. And by the opinions of the bench in the same case, it also appears that the liability and the promise ought to grow out of the same contract. In that action which was in *assumpsit*, the plaintiff declared that the defendant, in consideration that the plaintiff, at his request, would let to hire, and deliver to one Joseph English, a gelding of the plaintiff's, to ride to Reading, in the county of Berks, undertook and promised the plaintiff, that the said Joseph would deliver the said gelding to the plaintiff. Upon **non assumpsit* pleaded, this cause came to trial before Holt, Chief Justice, at Westminster Hall; and the counsel for the defendant insisting, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds, 29 Car. 2, c. 3, s. 4, and

That the person undertaken for should be liable at the time of the promise made, and that the liability and the promise ought to grow out of the same contract.

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(*) 2 Lord Raym. 1085. 6 Mod. 248, S. C. by the name of *Bourkamire v. Darnell*.

the Chief Justice doubting of it, a case was made of it, and ordered to be moved in court, to have the opinion of the other Judges. And it was argued and insisted for the defendant, that this case was within the statute of frauds, 29 Car. 2, c. 3, s. 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. That the very letting out and delivery of the horse to English implied a contract by English to redeliver him, and he was bound by law so to do, and consequently the defendant was to answer for the default of another. And the counsel for the defendant reminded his Lordship of his own rulings, that where an action will lie against the party himself, there, an undertaking by a third person is within the statute; but that where no action will lie against the party himself, it is otherwise. And he said he agreed, that if a man should say to another, do you build a house for J. S. and I will pay you; that case is not within the statute, because there J. S. is not liable. But this case is not more than this, if a man should say, do you let J. S. have goods, and if he does not pay you, I will: this is within the statute, because an action will lie against J. S. for the money for the goods: or, if a man shall say, take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible, that is also within the statute.

Upon the first motion and argument upon this case, the three Judges against Powys, seemed to be of opinion, that this case was not within the statute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And Powell, Justice, said, that the rule, of what things shall not be within the statute, is not confined to these cases only, where there is no remedy at all against the other, but where *there is no remedy against him on the same contract*. This case is just like that wherein a man says, "send goods to such a one, and I will pay you;" that is not within the statute, for the seller does not trust the person he sends the goods to. So here, the stable-keeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent; he may be charged in detinue, or trover and conversion, which are collateral actions.

Powys, Justice, said, that there was a trust to English, for the very lending of the horse necessarily implied a trust to the person he was lent to, and consequently the defendant in this case

was to answer for the default of another, and was within the statute. Powell, Justice, agreed, that if a man should say, lend J. S. a horse, and I will undertake he shall pay the hire of it ; or send J. S. goods, and I will undertake he shall pay you ; that these cases would be within the statute ; and agreed with Powys, that if any trust were given to English, then the case would be within the statute. But he and the Chief Justice and Gould held, that there was no credit given to English ; and the Chief Justice agreed with him, that if there had, this promise would have been an additional security, and within the statute. And the Chief Justice said, that if a man should say, " let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, any more than if a man should say, " deliver clothes to J. S. and I will pay you." He said also that a bailee of a horse for hire is not bound to redeliver him at all events, but if he be robbed of him without fraud in him, he is excused, and that so it was ruled in the case of *Cogga v. Bernard*.(1)

The last day of the term, the Chief Justice delivered the opinion of the court. He said, that the question had been proposed at a meeting of judges, and that there had been a great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant, but that the judges of this court were all of opinion, that the case was within the statute. The objection that was made was, that "if English did not deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and detinue is the adequate remedy, and consequently, this promise by the defendant is collateral, and is within the reason and the very words of the statute ; and is as much so, as where a man is indebted, and J. S. in consideration that the debtor would forbear the man, promises to pay him the debt ; such a promise is void, unless it be in writing. Suppose a man comes with another to a shop to buy goods, and the shopkeeper should say, " I will not sell him the goods, unless you will undertake he shall pay me for them," such promise is within the statute ; otherwise, if the promiser had been the person to pay for the goods originally. So here, detinue lies against English, the principal ; and the

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(1) 1 Lord Raym. 216

plaintiff having this remedy against English, cannot have an action against the defendant, the undertaker, unless there had been a note in writing.

This case, which is proper to be resorted to as the best general guide in the construction of this branch of the statute, mainly depended, as we perceive, on the question, whether, at the instant of making the promise, there was or was not an existing liability in the party undertaken for. And it appeared to all the judges upon the first argument, except Powys, that the mere delivery of the horse to English, generated no right of action, nor could be regarded as any contract made with him; but that the right of action would arise, if it arose at all, against the deliverer, by some matter subsequent to the agreement, as a demand of the horse and a refusal, affording a ground for the remedy by trover, which would depend upon some act of detainment or conversion. But though this could not have been denied if trover had been the only remedy, yet, as detinue also lay, the root of which action of detinue was the original delivery, implying a contract for the redelivery, and this implied contract, and the act of delivery, *and also the promise by the defendant, were all coincident in time, there was every circumstance to support the construction of a collateral promise.

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Of the effect of expressions, as constituting a collateral or original promise.

The distinction between the collateral and the original promise, founded upon the effect of mere expressions, is well exemplified in the *nisi prius* case of *Watkins v. Perkins*,^(u) by Chief Justice Holt. If, says his Lordship, A promises B, being a surgeon, that if he will cure D of a wound, he will see him paid, this is only a promise to pay if D does not, and, therefore, it ought to be in writing within the statute of frauds. But if A promise in such a case, that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing. In the case first put, it is clear, that B will have a double remedy; in the second case, the credit would be considered as wholly given to the express promiser. And even, if by subsequent circumstances, D should render himself liable, such liability not having existed, or come into existence at the time of the promise, would not have any effect in varying the predicament of the first promiser, whose promise would still be good without writing. Again, if A(x) promise B, that in consideration of his doing a particular

(u) 1 Lord Raym. 224.

(x) Fitigibbon, 302.

act, C shall pay him such a sum, or that if C do not pay him such a sum, he (A) will pay the same, this is no collateral promise, unless C was privy to the contract, and recognised himself as a debtor also ; but otherwise A is the sole debtor, and the statute is out of the case. Upon the whole, however, it will be found difficult, if not impossible, to lay down any rule, in the abstract, for the construction of these kinds of expressions ; they must go to the jury, together with the accompanying circumstances, from which they are to collect, by inference, to whom the credit is really given.

In discussing this critical part of the statute, though much has of necessity been left to float on the facts and circumstances of the particular cases, one anchorage has at least been *gained, viz. that the person undertaken for, must be or become liable at the time the promise by the third person is made. But whether the spirit and language of the statute, and the analogy of the cases will warrant us in saying, that to bring a case within it, the liability of the person on whose account the promise is made, ought to continue unchanged in its relation and subject matter, until the performance of the collateral promise, is a point not so clear upon the authorities. The promise required to be in writing by the statute, is that which is specially made to answer for the debt, default, or miscarriage of another ; and it seems as if in some of the cases, an opinion has been entertained, that to answer or become responsible for the debt, and particularly for the default or miscarriage of another, implied an undertaking to do that which another was liable to perform, in case of his failure only, and could not be applied to an absolute engagement to pay the debt, or perform the duty of another, upon that other's being instantaneously discharged from his own obligation ; which should be considered as an original promise by substitution, rather than as a collateral undertaking ; for that a collateral undertaking it could not be, unless there was a subject existing to which it might have this relation.

The reader should, however, be reminded, that, although '*collateral promise*' has become the technical phrase, whereby the promise within the statute has generally been distinguished, such word does not occur in the statute itself, and cannot, therefore, be taken as a *certain* criterion, in deciding whether a promise for another is, or is not, within the meaning of this law. The pro-

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Whether the person undertaken for, should continue liable, for the promise to be a promise within the statute.

mise mentioned by the statute is as well that whereby a man undertakes to answer for the *debt*, as for the *default* of another; and although, where the original party was liable to the performance of some act, (to which case the words *default* or *miscarriage* seem properly applicable) the promise may be construed in the limited sense of an *alternative* undertaking only; yet such interpretation will be too narrow, where the promise is to *pay the debt of another*.

- * [225] To answer for another man's debt *seems to be a phrase extending as well to promises to pay another's debt, where the promise is made in consideration of an instantaneous discharge of the party originally liable, so as to substitute the promiser in his place as the *only* debtor, as where the engagement is only meant to be in the alternative: and as the greatest lawyers have, for a series of years, strongly declared their conviction of the expediency of a liberal construction of the statute, there does not appear to be any just ground for confining this clause to the case of such promises only which suppose the liability of the original debtor to remain. Where, indeed, there was no previously existing debt, as where the undertaking arises upon the furnishing and delivery of goods by a trader to a third person, to place such case within the reach of the statute, it is necessary that the deliverer should become liable; in such case, therefore, the liabilities of the party undertaken for, and the party undertaking, must necessarily exist together. But if I undertake to satisfy the debt of a person already indebted, in consideration of his instantaneous release, there seems to be no good reason for saying, that this is not a promise to answer for the debt of another, within the reason and contemplation of the act of parliament. In the report of a case just decided in the Common Pleas,^(y) the Lord Chief Justice, before whom the case was tried, is stated to have said, that at the trial it appeared to him to be doubtful, how far the promise in that case could be deemed to be within the statute; for that he did not see how one person could undertake for the debt of another, when the debt for which he was supposed to undertake, was discharged by the very bargain; but his Lordship, in delivering his subsequent opinion on the case, laid no further stress upon this point, and Mr. Justice Chambre observed, that he should have thought the case within the statute of frauds, but for another reason to which the reader's attention will be next invited.

(y) Anstey v. Marden, 1 New Reports, 130.

If the original debtor is intended to be only relatively and not absolutely discharged, and the person promising substitutes himself as the debtor, in consideration of the release of the party indebted, *quoad* the original creditor, the right of suing for the original debt being only understood to be transferred, the transaction assumes a character, which, according to many recent cases, takes it clearly out of the statute. The case which has just been referred to, is a good example of this rule of construction; of which the reader will have no just idea, without a full statement of its circumstances. The declaration was for a breach of promise, in not replacing stock which had been sold out by the plaintiff for the defendant, and the produce whereof had been paid to the defendant, to which the defendant, after the general issue, pleaded as follows, viz. that the plaintiff ought not to have or maintain his said action against him, to recover any more or greater damages than the sum of 52*5*l. because he says, that he, the defendant, on such a day, was indebted to the plaintiff, by virtue of the said several promises and undertakings in the said declaration mentioned, in the sum of 976*4* 2*s*. 6*d*. and no more, and that he, the said defendant, afterwards, and before the commencement of this suit, to wit, on, &c. at, &c. was also indebted to divers other persons, to wit, James Greenwood, &c. &c. in certain other large sums of money respectively, and the defendant being so indebted as aforesaid, the defendant was unable to pay to them, his said creditors, the full amount of the said several debts, whereof the said plaintiff, and the said several other creditors of the said defendant, then and there had notice; and that it was thereupon computed and agreed, upon an investigation had by the plaintiff, and the said several other creditors of the defendant, that the estate and effects of the said defendant would not extend to pay 10*s*. in the pound, on the amount of the debts due and owing by the defendant, whereupon it was then and there proposed and agreed, by, between, and amongst the plaintiff and the said several other creditors of the said defendant, and also by Thomas Weston, by the procurement of the defendant, and at the request of the plaintiff, that the said Thomas Weston should and would pay out of his own proper monies to the plaintiff, and the said several other creditors of the defendant, a sum of money *equivalent to 10*s*. in the pound, on the amount of their respective debts, *in full satisfaction and discharge thereof*; which said sum of money they,

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Where the debt is to be kept on foot, after payment by the party promising, and to be transferred to him as a purchaser thereof, the promise is not within the statute.

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the plaintiff, and the said several other persons, creditors of the defendant, should and would severally accept and receive *in full satisfaction and discharge of their said respective debts*. The plea then states the mutual promise to perform the said agreement, and avers that, in pursuance of the same agreement, the said Thomas Weston, before the commencement of this suit, to wit, on such a day, tendered, and offered to pay, out of his own proper monies, for and on the behalf of the defendant, to the plaintiff, the sum of 525*l.* being so much as amounted to 10*s.* in the pound, upon the said sum of 976*l.* 2*s.* 6*d.* the said amount of the said debt, which sum so tendered, the plaintiff refused to accept. And that the said Thomas Weston, from the time of making the said agreement, always hitherto had been, and still was ready to pay the said sum of money to the plaintiff, &c. The third plea was like the former, only stating the agreement between the plaintiff, the defendant, and Thomas Weston. And the fourth plea was like the second, except that it did not specify the names of the creditors. The replication joined issue on the plea of non-assumpsit, and tendered issues on the agreements stated on the other pleas; and issues were joined thereon.

It has before been mentioned, that on the trial of this cause, the Chief Justice expressed a doubt whether that could be properly said to be a promise within the statute, by the very terms of which the debt was supposed to be discharged, and that his Lordship did not seem to adhere to this doubt in the sequel. Some arguments, too, have been adduced, to show the restrictions of the statute to apply to this description of promises. In the opinion of Mr. Justice Chambre, as delivered by him in the same case, great stress was laid upon the circumstance, that the intent of the contract was not to *discharge* the party indebted, *but to keep the debts on foot*; which, indeed, was the feature of the case which gave to it the character of a *purchase*. It appeared to that

* [228] learned judge, to be perfectly clear, that the transaction in substance was a contract to *purchase* the debts of the several creditors, instead of being a contract to *pay* or *discharge* the debts owing by Marden. He observed further, that if the contract had been that, which it was represented to have been, on the special pleas, he should have thought it a case within the statute of frauds.

Upon the same principle of considering the transaction in the light of a purchase, the case of *Castling v. Aubert*,^(z) was determined by the court of King's Bench, to be entirely clear of the statute. The case was shortly thus: the plaintiff, who was the policy broker for one Grayson, had policies of insurance in his hands, belonging to his principal, which were securities on which he had a lien for the balance of his account. And on the faith of these he agreed to accept bills for the accommodation of his principal. One of these bills became due, and actions were brought against the plaintiff as acceptor, and against Grayson as drawer. It was desirable, that the policies should be given up by the plaintiff to the defendant, to whom Grayson had at that time transferred the management of his insurance concerns, in order to enable him to recover the money for the losses incurred from the underwriters; and the defendant undertook, upon condition that the policies were made over to him, to settle the acceptances due, and to lodge money in a banker's hands for the satisfaction of the remainder, as they became due. This transaction was considered in the light of a purchase by the defendant of the plaintiff's interest in the policies. And not in that of a mere promise to the creditor to pay the debt of another due to him; for it was in truth a promise by the defendant to pay what the plaintiff would be liable to pay, on condition of having the securities put into his the defendant's hands, as the means of enabling him to indemnify the plaintiff; or, as Mr. J. Le Blanc put the case, 'one man having a fund in his hands, which was adequate to the discharge of certain incumbrances; another person undertook that, if the fund was delivered up to him, he would take it with the incumbrances.'

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It should be remarked, that the Chief Justice, in this case of *Castling v. Aubert*, laid considerable stress upon the circumstance that the *defendant* had not the discharge of Grayson principally in his contemplation, but the discharge of *himself*. 'That was his moving consideration, though the discharge of Grayson would eventually follow; which is an illustration of Mr. Justice Chambre's reasoning, in the above-mentioned case of *Anstey v. Marden*, in the Common Pleas, except that, indeed, the contract there was not only not made in contemplation of the discharge of the original debtor, but with the direct purpose of keeping his debt on foot. In *Anstey v. Marden*, the contract was a purchase

(z) 2 East, 325.

of debts, or rather of the right of recovering debts for the promisor's own benefit; in *Castling v. Aubert*, the promisor took upon himself to answer for the payment of monies to which the promisee was liable, in consideration of having the fund transferred to him, out of which was to come his indemnity. The *object* of the promise was in neither case the *discharge* of the original debtor, though in the one case that discharge would follow eventually from the undertaking of the purchaser, while, on the other, the continuance of the original debt was implied in the very undertaking. The principle of the transactions in both cases was the same, though the consequences were dissimilar.

Whether the promise is within the statute, where the promiser is himself already liable.

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It may be worthy of remark, that Lord Ellenborough, in the case of *Castling v. Aubert*, illustrated his distinction between the discharge which arises collaterally and eventually, and that which follows as the direct purpose of the undertaking, by the case of a bill of exchange, upon which several persons are liable: in such case, says his Lordship, if it be agreed to be taken up by one, eventually, others may be discharged; but the *moving* consideration is the discharge of the party himself, and not of the rest, although that also ensues; and his Lordship seemed to consider such undertaking by a party already liable, as plainly out of the statute. Agreeable to *which doctrine is the authority of Lord Holt, in *Stephens v. Squire*,^(a) which case was thus—an action had been brought against Squire, an attorney, and two others, for appearing for the plaintiff without a warrant; and this cause being carried down to be tried at the assizes, the defendant promised, that in consideration the plaintiff would not prosecute the action, he would pay 10*l.* and costs of suit. And an action was brought against the defendant upon this promise; but the court were of opinion, that this could not be said to be a promise for another person, but for his own debt, and, therefore, not within the statute. According to the report of the same case in *Comberbach*,^(b) the Chief Justice observed, that it was an original promise, and the party himself liable. Upon which, Sir Bartholomew Shower asked his Lordship, whether it would not have been plainly within the statute, if the promisor had not been a party. But Holt desired him to put that case when it came. Here, said his Lordship, he appears to be a party concerned in the former action. It is to be observed, that the defendant in the case just

(a) 5 Mod. 205.

(b) Page 362.

mentioned was not only liable, but had actually been sued, and that his promise therefore had a direct view to his own discharge, though it would operate eventually in discharge of third persons; which brings it within the doctrine so satisfactorily stated by the present Chief Justice of the King's Bench, in the case of *Castling v. Anbert*, just mentioned. (90)

But it should further be considered, that the 10*l.* undertaken for was not the debt of any other person, but offered by the defendant as a compensation for damages; therefore, perhaps, that part of his undertaking which respected the costs, came more properly into question upon the statute; as to which, upon the ground of his being a party, and liable *himself, according to the above-mentioned doctrine, the case seemed to be out of the statute. But suppose the defendant had expressly said to the plaintiff, go to J. S. (being one of the other persons concerned in doing that which was the subject of the action) and ask him for to pay the costs, and if he will not, I will be personally and wholly responsible for the amount; perhaps a promise *expressed in these terms*, though made under those circumstances, would be considered as falling within the statute. For such appears to be the doctrine of *Winckworth v. Mills*, (c) in which it was held by the late Lord Kenyon, at *nisi prius*, that a promise by the indorser of an unpaid note, to indemnify the holder, if he would proceed to enforce payment against the other parties to the note, must be in writing, or it would be void, under the statute of frauds. (91)

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The reader will observe, in the perusal of the instructive case of *Anstey v. Marden*, above cited, that the Chief Justice in his opinion stated, that it had rather struck him at the trial, that the promise being only to pay 10*s.* in the pound, and not to pay the whole debt, it was an *original* agreement, and, therefore, not within the statute. But he afterwards admitted in the argument, that *Chater v. Beckett* (d) was a decisive authority the other way. The

(c) 2 Esp. 484.
2 Vent. 223.

(d) 7 T. R. 201; and see *Lexington v. Clark*,

(90) *Watson v. Turner, et al. Exchequer. Bull. Ni. Pri. 281*, seems to be grounded on the same doctrine.

(91) The counsel for the plaintiff seeming to be dissatisfied with his Lordship's ruling, he offered to save the point, but they declined it.

great point of the adjudication, in *Chater v. Beckett*, viz. that a parol promise to pay the debt of another, and *also to do some other thing*, is void as to both, by the statute of frauds, such contract being entire and incapable of separation, has in an early part of this work been set before the reader, so as to save the necessity of any further observations thereon in this place.

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If the promise has not an immediate respect to the liability, but springs out of a new and distinct transaction, it is not within the statute.

*It is to be observed, in the second place, in regard to these promises founded on the liability of another person, that to constitute them such as are necessary by virtue of the statute of frauds to be committed in writing, the consideration should appear to have an immediate respect to the liability of the party promised for. If it spring out of any new transaction, or move to the party promising upon some fresh and substantive ground, of a personal concern to himself, the statute of frauds does not attach upon such promise, but the same may be good, if the consideration be sufficient, though existing in parol only.

Thus, unless the liability of the person to whom, in the case of *Buckmyr v. Darnall*, the horse had been lent, had arisen upon an implied contract to re-deliver him, for which detinue might be brought (which is a species of mixed remedy, resting partly on contract, and partly on tort) the promise of the defendant would have wanted that correspondence with the original liability of the party answered for, which was necessary to bring it within the statute; for it was remarked by Powell, Justice, with his usual discrimination, that there must not only be a remedy against the other, but a remedy upon the *same* contract; and, as the counsel for the plaintiff put it, the question upon the statute is not only whether an action does or does not lie against the party himself upon the contract, but also whether it does or does not lie against him upon collateral respects. If, therefore, the promise is founded upon a fresh, distinct consideration, moving to the party promising, it seems a perfectly established doctrine, upon all the cases, that the statute will not extend to it. In the case of *Castling v. Aubert*, we have seen, that there was a distinct and new consideration, viz. the giving up of the securities, which were in the hands of the plaintiff. The argument at the bar seems, therefore, to have taken much too narrow a ground, when it was contended, if the report states accurately the words of the counsel, that the statute was no bar to the plaintiff's recovery in that case, as it only applied to cases, where there was *no consideration*

for the promise ; for *if that had been the only object of the statute, it would have been nugatory in respect to this branch of its provisions, since, as has been sufficiently shown, the promise would have been a *nudum pactum* by the common law, without a sufficient consideration. Doubtless, therefore, it was not the circumstance of there being a consideration for the promise, which was the point for the counsel to have insisted upon, but that there was a new and engrafted consideration, moving to the party himself, who made the promise, and not to the party in respect to whose liability the promise was made. The authorities adduced to prove, that the existence of a consideration took a case out of the statute, did not prove what is certainly not law, but they proved that this was the consequence of there being a *distinct* consideration *superadded*. As in *Meredith v. Short*,^(e) where the promise was in consideration of a delivery of a note, under J. S.'s hand, for 50*l.* and so again in *Love's case*,^(f) where the promise was by a stranger to a sheriff's officer, in consideration that he would restore goods taken on a *feri facias*, to pay the debt of the defendant.

Thus, also, it appears, from the case of *Tomlinson v. Gill*,^(g) reported by Mr. Ambler, to have been clearly Lord Hardwicke's opinion, that if the consideration of the promise takes its root in a transaction distinct from the original liability, the case is out of the statute. There the defendant Gill promised the widow and administratrix of an intestate, that if she would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets, to discharge the intestate's debts. Thus, also, in *Read v. Nash*,^(h) the consideration of the promise was perfectly distinct from any liability of the original defendant : Tuack, the plaintiff's testator, brought an action of assault and battery against one Johnson ; the cause being at issue, the record *entered, and first coming on to be tried, the defendant Nash, being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, undertook and promised to pay Tuack 50*l.* and the costs in that suit to be taxed up to the time of withdrawing the record ; the statute was pleaded, and the plaintiff demurred, and Lee, Chief Justice, declared the opinion of the court to be, that this

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(e) 1 Salk. 25 ; and see S. C. in 2 Lord Raym. 759, by the name of *Meredith v. Chute*. (f) 1 Salk. 28. (g) Ambler, 330. (h) 1 Wils. 205.

promise was an original promise, sufficient to found an assumption upon against Nash ; Johnson was not a debtor ; the cause was not tried ; he did not appear to be guilty of any default or miscarriage ; there *might* have been a verdict for him, if the cause had been tried, for any thing the court could tell ; he never was liable to the particular debt, damages, or costs.

But the case most illustrative of this distinction between a promise, the only moving consideration for which is the liability of another person, and that which is grounded upon a superadded inducement, is that of *Williams v. Leper*,⁽ⁱ⁾ reported in *Burrow*, which was as follows : Taylor, a tenant of the plaintiff, being in arrear for rent, to the amount of 45*l.* for three-quarters of a year, conveyed all his effects for the benefit of his creditors. They employed Leper, the plaintiff as a broker, to sell the effects ; who, accordingly, advertised a sale. On the morning advertised for the sale, Williams, the landlord, came to distrain the goods in the house. Leper, having notice of the plaintiff's intention to distrain, promised to pay the arrear of rent, *if he would desist from distraining* ; and Williams, on the faith of this promise, desisted accordingly. At the trial a verdict was found for the plaintiff, for 45*l.* and on a case reserved, it was contended on behalf of the plaintiff, that this was not such a special promise for the debt of another, as was within the statute of frauds ; which statute only meant to prevent parol promises, where there was *no new consideration* moving from the party making the promise to the party *to whom it was made : that the legislature did not mean to prevent direct undertakings, but only collateral ones, for the debt, default, or miscarriage of others. Whereas, here was a *new* consideration ; for the goods of Leper were, at the time of the promise, liable to the landlord's distress. It was, therefore, a *direct* undertaking for *himself*, and not for *another*. The plaintiff had a legal interest in these goods, prior to the bill of sale, and was deprived by the defendant of an advantage, which he could never have again. The property of the goods was in Leper, as a trustee for the creditors, at the time when he made this promise ; it was, therefore, an original undertaking, moving upon a consideration personal to himself.

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(i) 3 Burr. 1886.

To which it was answered by the counsel for the defendant, that upon this declaration, coupled with the facts given in evidence, the plaintiff had a right to recover this 45*l.* for that the declaration expressly charged 'that Taylor was indebted to the plaintiff, in 45*l.* for three-quarters of a year's rent; and that the defendant undertook to pay it;' which was directly within the words of the statute of frauds, 'a special promise to answer for the debt of another person.' That Leper was in possession of the goods of the tenant, who owed the plaintiff three-quarters rent, and being about to sell them, the landlord came to distrain for this rent in arrear, and Leper promised to pay it, if he would desist from distraining. He promised *absolutely* to pay it, and not to pay it *out of the goods*, or with any other restriction. But the Chief Justice, Lord Mansfield, said, that the case had nothing to do with the statute of frauds. The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He entered to distrain; he had the pledge in his custody. The defendant agreed that the goods should be sold, and the plaintiff paid in the first place. The goods were the fund: the question was not between Taylor the tenant, and the plaintiff, the landlord. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, *and was obliged to pay the landlord, who had the prior-lien: this has nothing to do with the statute of frauds. Wilmut and Yates, Justices, were of opinion, that this was an original promise; and Mr. J. Aston said, he looked upon the goods to be the debtor, and that Leper was not bound to pay to the landlord more than the goods sold for.—The goods were a fund between both, and on that foot he concurred.

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The case of *Fish v. Hutchinson* (k) is plainly distinguishable from the case of *Williams v. Leper*, and *Read v. Nash*, mentioned above. In which case of *Fish v. Hutchinson*, the facts were simply these: *Vickars* was indebted to *Fish* in a sum of money, and *Fish* had commenced an action for it; whereupon the defendant promised, that in consideration the plaintiff would stay his action against *Vickars*, he would pay the money which was owing. Here there was a debt subsisting at the time of the promise, so that the liability of him, on whose behalf it was

(k) 2 Wils. 94.

made, was the moving consideration to the promisor. The liability of the party was so immediately the ground of the promise, that the action could not have been sustained against the promisor, without showing such liability to have been in existence when the promise was made. In *Williams v. Leper*, it was the promisor's *own* liability, which was the immediate ground of the promise; and however that liability might be shown to have originated in the tenant's liability primarily to pay the rent, yet the promise, being immediately moved by the defendant's own liability, by reason of his having possession of the goods, whereon the plaintiff's lien had attached, might in that respect be said to be original. The tenant's liability was in fact in a way to be removed by the distress upon the goods, and the object of the promisor, in procuring the fund to be released from the plaintiff's claim, was not for the benefit of the tenant, or intended in any way to prop or sustain his credit. The tenant's liability was sunk

* [237] in the subsequent proceeding. In **Read v. Nash*, the defendant on the first action had not yet become liable; the period had not yet arrived, at which any debt, default, or miscarriage could be imputed to him. If judgment had been given in the first action, ascertaining the damages, a promise by a third person to pay these damages would doubtless have been within the statute; for then a specific liability would have arisen.

The principle of the decision in *Williams v. Leper*, was recognised, although the case was not cited by name, in *Houlditch et al. v. Milne*; (1) a case before Lord Eldon, Ch. J. *at nisi prius*. It was an action of assumpsit, for the repair of carriages, the facts in support of which were, that certain carriages belonging to Mr. Copey had been sent by the defendant to the plaintiffs to be repaired, the orders concerning them being given by the defendant. One of the carriages had been bought by Mr. Copey himself, and paid for by him; and the bill, which was the object of the action, contained a charge for repairs done to this carriage, but it was made out in the name of Copey.—When the carriages were repaired, the defendant sent an order to pack them up, and send them on board ship; the plaintiff upon this sent to know who was to pay for them; the defendant said he had sent them, and he would pay for them. The

carriages were afterwards packed up, and sent on board ship, and the bill was made out and delivered to the defendant; he desired time to look over it, and when the plaintiff's clerk called a second time, he said, the charges appeared very high; but desired the clerk to call in a very few days, and he would settle it. Not having done so, the plaintiff's attorney waited upon him, when the defendant said, that he had been told that the bill was a very exorbitant one, and a fit subject to refer. However, he said, he had the money to pay it, though he did not say whether it was his own or Copey's. Upon these facts, it was contended on behalf of the defendant, *that there being no proof of the defendant's having money of Copey's in his hands, to apply to the count in the declaration for money had and received, the plaintiff must be nonsuited, and that it was within the principle of *Matson v. Wharam*,^(m) in which it was decided, that if the person who had the goods was *at all* liable, the undertaking by another must be in writing. If, therefore, Copey was himself liable to the plaintiff, the present action could not be supported. But the Chief Justice took a ground for his decision which superseded that inquiry. He said, that if a person had obtained possession of goods on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary; that such a case appeared to apply precisely to the one before him. The plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the defendant's promise to pay. His Lordship was of opinion, that that circumstance took the case out of the statute, and that, consequently, the defendant was liable for the amount of the bill.

The subject of this Third Chapter is now brought to a conclusion; it may be properly closed with observing generally, that any judicial confession by the defendant, saving the necessity of all proof whatsoever, will exclude the application of the statute of frauds. Thus, where a tender⁽ⁿ⁾ is pleaded to a count upon a promise, clearly within the prohibition of the statute, and money is paid into court, as is requisite to be done upon this plea, the defendant has submitted to the action, and shall not be suffered to commit the gross inconsistency of afterwards resort-

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(m) 2 T. R. 80. (n) *Middleton v. Brewer*, Peake, Ni. Pr. Ca. 15.

ing to the protection of the statute. And in this respect, the courts of law and equity concur; for though in courts of equity it seems now to be a doctrine nearly established, that a defendant may admit the agreement and plead the statute, yet unless he
* [239] pleads *the statute, his admission will be taken as a submission and we have seen in the case of *Spurrier v. Fitzgerald*,^(o) the conclusive effect of this submission upon the pleadings.

(o) 6 Vez. jun. 548.

CHAPTER IV.

Sections the First, Second, and Third.

All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorised by writing, shall have the force and effect of leases, or estates, at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect ; any consideration for making any such parol leases, or estates, or any former law or usage to the contrary notwithstanding.

2d. Except nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the full improved value of the thing demised.

3d. And moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note, in writing, signed by the party so assigning, granting, or surrendering the same, or their agents, thereunto lawfully authorised by writing, or by act and operation of law.

*PART I.

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Parol Demises.

IT will be convenient to include under one consideration the first and second sections of the statute, which will properly constitute the first part of the 4th chapter ; and perhaps the subject will be best introduced by considering by what acts or attempts this branch of the statute is transgressed.

The term of three years for which a parol lease will be good, must be three years only from the time of making it.

And though it is granted so as to have a future commencement, yet if it do not comprise more than three years, reckoned from the time of making it, it is made good by the exception.

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If a tenant from year to year holds for above three years, his interest in reckoning backward is considered as an entire lease for the whole time of his actual holding; but still each

No lease by parol will be good, under these provisions, which imports to convey an interest for more than three years.(92) which three years must be reckoned from the time of making the same. And, therefore, it was ruled by Lord Holt, in the case of *Rawlins v. Turner*,^(a) that a lease for three years, of land, to be good without deed, must be for three years, to be computed from the time of the agreement, and not for three years to be computed from any day after. But leases by parol for less than three years from the time of making them, though they be granted to commence at a future day, are clearly not within the statute. Thus, in *Riley v. Nicks*,^(b) the plaintiff declared, that on the 24th day of February, 1723, she demised to the defendant a chamber, a cellar, and half a shop, to hold from Lady-day then next, for a quarter of a year, and so from quarter to quarter, so long as both parties should please, at 5*l.* per quarter. It was objected, that this lease being to commence at a future day, was but a lease at will, since the statute of frauds. The Chief Justice at first thought it a good objection, but upon farther consideration, he was of opinion, that the exception *was not confined to leases that were to commence from the time of the making, but was general as to all leases, that were not to hold for above three years from the making; and the plaintiff had a verdict accordingly.

If a lease be made for three years, and so from three years to three years, this is a lease for six years, and so void by the statute unless it be in writing,^(c) and a lease for one year, and so from year to year for or during 40 years, is a lease for the term of 40 years.^(d) But if a parol lease be made *de anno in annum quandiu ambobus partibus placuerit*, this is adjudged to be a lease only for one year certain,^(e) and that every year after, it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies 10 years, these years, by computation from the time past, make an entire lease for so many

(a) 1 Lord Raym. 736.

(b) *Strange*, 651, coram Raym. Ch. J.

(c) *Plowd.* 273. (d) *Id. ibid.* Bro. tit. Leases, 49. But it is otherwise where it rests in covenant to grant a fresh term at the end of the first, and so on. (e) *Legg v. Strudwick*, 2 Salk. 414.

(92) But still an agreement for a lease of any duration must, it should seem, be invalid, if not in writing, and signed according to the 4th clause of the 4th section; unless it can operate as a present demise.

years; and if rent be in arrear for one part of one of those years, and part of another, the lessor may distrain and avow as for so much rent in arrear upon one *entire* lease, and need not avow as for several rents due upon several leases, accounting each year a new lease ;(f) for it has been adjudged, that after the commencement of each new year, it becomes an *entire* lease certain for the years past, and also for the year entered upon ;(93) *so that nei-

(f) Birch v. Wright, 1 T. R. 380.

(93) The last editor of Bacon's Abridgment has added a sensible and pertinent note on this subject. Vide Bac. Abr. tit. Leases, L. 4, part whereof is here extracted for the reader. "It is now clear", says that Gentleman, "that a lease for a year, and for such further term as the parties shall agree upon, or from year to year as long as it shall please both parties, is, with a view to its present extent, a lease for a year certain, and no more; though with a view to the time which has elapsed, or the number of years which the tenant has occupied, it is considered as an estate for all that time, including the current year. In the case of Agard v. King, Cro. Eliz. 775, where the court are made to say, that such a lease was a lease certain at first for two years; it is to be remembered, that they were not considering the present, but the past estate which the tenant had: what they say, therefore, must be understood with reference to that, and to import nothing more than it was at first, that is, upon the expiration of the two years, a lease for these two years, whatever it might be as to the third year which the tenant had entered upon, and upon which only the question in that case arose. And so in the case of Bellasis v. Burbridge, referred to in Salk. 413, and fully reported in Lutwich 213, the lessee under a demise for a year, and so on from year to year, &c. had occupied one year and part of another; and the court said that this was a good lease for two years at least; that is, that the tenant having continued the occupation part of another year, the lease was thereby become a good lease for that year; not that the lease by the terms of it was originally, and in its creation, a lease for two years certain. And, notwithstanding the puzzle and contrariety of opinions in the books, with respect to these running leases, the law is now considered as settled agreeably to the case of Legge v. Strudwick. They are leases for one, two, or more years, according to the form of the lease, dependent for their further continuance upon the will of the parties. If it be the will of the parties that they should have a further continuance, (and that such is their will, the law will presume, unless the contrary be evidenced by a regular half-year's notice to quit, given by one to the other) the tenant so continuing in possession, is not a mere tenant at will, but a tenant for years: it is the will of the parties that

succeeding year is a new *springing* interest upon the first contract, so that prospectively there never was any lease for more than a year; such case, therefore, is within the exception, and good.

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ther party can determine it before that year is run out. And such executory contract is held, not to be void by the statute of frauds,^(g) though it be for more than three years, for at first this being a lease certain only for one year, and each accruing year after being a springing interest for that year, it is not a lease for any three years to come, though, by a computation backwards, when five or six or more years are past, this may be said to be a parol lease for so many years; but with this, it is said, the statute has nothing to do, but only looks forward to parol leases for more than three years to come. And this passage, which I quote from Bacon's Abridgment, is there supported by a reference to an analogous decision in Keble's Reports,^(h) where the plaintiff declared, that he retained the defendant *anno* 1657, for one year then next ensuing, and so from year to year *quamdiu*, &c. and that *anno* 1661, defendant withdrew himself from his service for a month *per quod*, &c. and the court held, that though the retainer at first was for a year certain, yet, after every other year begun, the retainer held for that year also, and gave judgment for the plaintiff.

A lease for more than three years, enures as a tenancy from year to year.

It is to be observed, that though by the statute of frauds it is enacted, that all leases by parol, for more than three years, shall have the effect of estates *at will* only, yet such a lease, by the construction of the courts, enures as a tenancy from year to year, and requires, therefore, a regular notice to determine the interest as in other similar holdings. Thus, in the case of Clayton v. Blakey,⁽ⁱ⁾ an action had been brought against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then last; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence, that the defendant had held the premises for two or three years under a parol demise for 21 years from the day mentioned, to which the notice to quit had reference. On the statute of frauds, it was contended at the trial, that the holding should have been

(g) 2 Salk. 414.

(h) Keble 16.

(i) 8 T. R. 3.

they should continue the tenancy for another year: his precarious interest is for such further term become certain, but he has still the same kind of estate which he formerly had.

stated, according to the legal operation of it, as a tenancy at will ; and that, as there was no count adapted to that consideration of it, the plaintiff ought to be nonsuited. The judge, however, considering that it amounted to a tenancy *from year to year, overruled the objection, and the plaintiff obtained a verdict. And, upon a motion afterwards made to set this verdict aside, on the ground of a misdirection, Lord Kenyon, Ch. J. with whom the rest of the court agreed, held that the direction was right : “ for the meaning of the statute was, that such an agreement should not operate as a term ; but what was, when the statute was made, considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year.”

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But though the lease be void by the statute of frauds, as to the *duration* of the term, it is to be remembered, that in other respects the lease may be regarded as having an operation, at least as far as its terms are applicable to a tenancy from year to year. So that if land is let for seven years by parol, and the landlord agrees that the tenant shall enter at Lady-day, and quit at Candlemas, though such verbal lease is void by the statute of frauds, as to the *extent of interest* affected to be granted, yet the landlord can only put an end to the tenancy at Candlemas.

And though the lease itself be void under the statute, yet it may regulate the terms of the substituted interest.

An ejectment(*k*) was brought on the demise of T. Rigge. At the trial it appeared, that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question, called Hague's farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, viz. on the land at Old Lady-day, and the house on the 25th of May following, and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day ensuing was served on the 22d of September, 1792. And it was contended, that as the agreement for seven years was void by the statute, it being by parol, the defendant must be considered as tenant from year to year, each year commencing from Lady-day when he entered, and that, consequently, the notice to quit at Lady-day, served more than half-a-year before, was regular. But Lord Kenyon was of *opinion, that though the agreement was void by the statute of frauds, as to the *duration* of the lease, it must regulate the terms on which the tenancy subsists, in other

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(*k*) See on dem. Rigge v. Bell, 5 T. R. 471.

respects, as to the rent, the time of the year the tenant is to quit, &c. So, said his Lordship, where a tenant holds over after the expiration of a lease, without having entered into any new contract, he holds upon the former terms. In this case it was agreed, that the defendant should quit at Candlemas; and though the lease was void as to the number of years, for which the defendant was to hold, yet if the lessor chose to determine the tenancy before the expiration of the seven years, he could only put an end to it at Candlemas.

A lease which would not have been good by parol, at common law, is not now good by being in writing merely.

What leases were good by parol, and what were required to be by deed, at common law.

But it seems proper to observe generally, that where a lease would not have been good by parol at common law, it will not be effectual, though in writing, since the statute of frauds, if it is not also sealed and delivered. Thus, although since the statute a term for any number of years may be created by writing only without deed, yet if there is a lease actually in being, another lease cannot be made of the reversion without a deed poll, or indenture.⁽⁹⁴⁾ But we are to be understood to advert here to a reversion in the strict idea thereof, as drawing after it the rents and services, to the grant of which description of interest a deed was always essentially necessary. Writing, therefore, without both sealing and delivery, will be of no avail, since the statute, to pass out of the lessor such reversion, or reversionary interest for any term of years, whether few or many. But to pass what is properly called an *interesse termini*, or future interest, to commence at the expiration of a subsisting term; a writing *only* will be now sufficient, as a verbal grant or demise would have been at common law.⁽¹⁾

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Of the difference between the *interesse termini*, and the strict reversion.

*Thus, also, if at this day, there being a subsisting lease, the lessor were to make a lease in writing, without sealing and delivery, of the same premises to another, for a term exactly commensurate with the existing interest, such second lease would be purely an abortion, for such lease could not have been rendered effectual by parol only at common law, there being no future interest or *interesse termini* to pass; and, as a reversion, the lessor

(1) Vide Bro. tit. Leases 48. Plowd. 421, b. 422, 432, 521. Cro. El. 60.

(94) To effectuate which lease before stat. 4 & 5 Ann, c. 16, the attornment of the first lessee was also necessary.

could pass nothing without deed. But if the second lease exceed the duration of the subsisting lease, then an *interesse termini* may pass by writing only, as it might, before the statute, have been created by word of mouth. And where the second lease is commensurate in extent with the first, a deed poll(95) will carry the reversion, and draw after it the title to the rents and services of the first lessee, without attornment, since the statute of Anne.

PART II.

Surrenders.

AT common law, surrenders of estates for life or years were good if made by parol, except where the subjects were such as could not pass without deed, by reason of their nature and quality; which was the case with respect to those things which are said to lie in grant, as all incorporeal hereditaments. An advowson or rent, therefore, could not, nor can they at this day, be *surrendered* without an instrument sealed and delivered, for they are incapable of being *passed* without it. And remainders, though of lands which of themselves *might pass without deed by delivery and seisin only, inasmuch as they are the proper subjects of the conveyance by grant, can only be surrendered by deed. If a feoffment, therefore, be made to A for his life, with the remainder to B for his life, B's estate cannot be surrendered without deed, by reason of its nature and quality as a remainder, though the estate might have had its commencement without deed. On the other hand, though an estate was actually created by deed, yet, if it *might* have been *created* without it, it is capable of being *surrendered* without it. Again, though the estate began without deed, as a *tenancy by the curtesy*, or a *tenancy in dower* of an advowson or rent, yet, in respect of the *nature* and *quality* of the thing, which lies only in grant, it cannot be surrendered without deed. But the surrender of an estate of lands *in possession*, whether for life or years, might, at common law, and still may be surrendered

What surrenders must have been by deed at common law.

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(95) An indenture or fine would have still a stronger efficacy; for, by virtue of the estoppel, the second lease would operate as a *present* lease, and the second lessee, even without the possession, would be liable for the rent.

without deed or delivery, because it is only the restoring or yielding up of the estate again to him in the immediate reversion or remainder, which is an act favoured in the law.^(m) So a tenant for life, and he in reversion for life, might, at the common law, have joined in a surrender by parol; for, as it seems by Bennett's case,⁽ⁿ⁾ such a surrender would operate first on the part of the lessee for life, towards him in reversion for life, and then as the surrender of him in reversion; so that before the surrender worked with respect to the reversion, such reversion would have become an estate in possession, by the previous act of the lessee for life.

Where at common law a deed was necessary to perfect the surrender, the same solemnity is still required; and where it might have been by parol, writing is now necessary.

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Where, at the common law, for the reasons above mentioned, a deed was necessary to perfect a surrender, a surrender can still only be effectuated by the same solemnity; for the statute of frauds has given no new efficacy to a written instrument, except in a negative sense, by withdrawing from parol transactions, in the cases within its provisions, their legal virtue and validity. But with respect to lands in possession, which, at the common law, might have been surrendered by word only, without deed or writing, the statute has created *a necessity for a written document, by enacting, 'that no leases, estates, or interests, either of freehold or term of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering the same, or his agents thereunto lawfully authorised by writing, or by act or operation of law.' By this clause, writing is made essential to a surrender of estates for life or years in possession, but as a deed was not necessary at common law to validate such a surrender, so neither is a deed at this day required for such purpose; it is enough if there is a note in writing without seal. A lease, therefore, since the statute, may be created for any term of years by writing only, and by writing only may be effectually surrendered; and in the case of *Farmer v. Rodgers*,^(o) it was adjudged, that this note in writing required no stamp, though that seems since to have been rendered necessary by the statute, 23 Geo. 3, c. 58.

(m) See Coke Litt. 338 a. (n) 2 Roll. Rep. 20. (o) 2 Wils. 26, and Beck v. Phillips, 5 Burr. 2827.

As to the effect of cancelling the deed, whether such an act shall operate as a determination of the interest under a lease, a very different account seems to have been given in different places by the same great writer and judge. The treatise on leases and terms for years comprehended in Bacon's Abridgment, and supposed to be the production of Chief Baron Gilbert, under the letter T, thus states the distinction between the several descriptions of property in lease, in regard to the effect of cancelling the instrument or deed, whereby the lease was made. "As to leases for years, owing their existence to the deed or indenture whereby they are created, so that the cancelling or destruction thereof shall destroy and avoid the lease, a diversity seems to be taken in the books between such things as lie in livery, and may be executed by actual entry, and such things as lie only in grant, whereof no actual or manual occupation can be had; therefore, *if one had made a lease for years, at common law, of lands or houses by deed or indenture, and tear, rase, or cancel it, yet this would not destroy the continuance of the lease itself, because such lease of lands or houses lying in manurance, and actual occupation, might at first have been made by *parol* only, without any deed or indenture: and, therefore, such deed or indenture being not of the *essence* of the lease, the destruction or cancelling thereof shall not defeat or destroy the lease or interest of the lessee, because his actual entry into the land, and continuance of the visible possession and occupation thereof, give sufficient sanction and notoriety to the contract, as to the interest of the lessee in the lands and houses themselves, though thereby the deed itself, and all covenants, which had their existence only by the deed, are defeated and avoided. But if the King make a lease of such lands or houses, by letters patent, which are matter of record, and the letters patent and enrolment are destroyed or cancelled, the lease itself falls to the ground, because these letters patent and enrolment, which were of the *essence* of the creation and continuance of the lease, are destroyed and lost. So, if a common person had made a lease for years, or a grant for years, of tithe, common, advowsons, or other thing which lie merely in grant; in such cases the cancelling or destruction of the deed, whereby they were created and subsisted, must necessarily destroy the interest of the grantee likewise, because such deed was of the very *essence* of the deed or grant, without which it could not have been made at first,

Of the effect
of cancelling
since the sta-
tute.

* [250]

nor can subsist afterwards, such deed being the only evidence of the contract, which could not be executed by an actual possession or manual occupation. But now, since the statute of frauds and perjuries, which makes all leases for above three years, to have only the force and effect of leases at will, unless they be in writing, and signed by the party, &c. the deed or writing, whereby such lease is made, seems to be of the same essence as the lease itself; and, therefore, the cancelling or destruction of that, seems to destroy and avoid the lease itself, because it destroys all evidence allowed by law for the support thereof; though in such case Chancery frequently *sets up the lease again, or decrees the party to execute a new one, for the residue of the term, which is not against the prohibition of the act, because there was once a good and effectual lease made pursuant to the statute."

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It seems, therefore, in the above passage, which, like the other parts of that excellent title, is written with great clearness of stile and expression, to have been considered, upon good grounds, that the operation of cancelling the deed depended upon the question, how far the instrument itself was essential to the conveyance. Where the subject of the lease lay in grant, it appears that at common law the destruction of the instrument would defeat the interest taken under it, because such instrument was of the essence of the grant; but where the thing lay in livery and manual occupation, the deed being, at common law, the authentication only of the transfer, and not the operative act of conveying the property, the cancelling of the instrument would not involve the destruction of the interest conveyed. But when the statute made writing essential to a lease of hereditaments lying in livery, as well as of those which lie in grant, (which, as we have seen, must always have been by deed) it was thought by the writer of the passage above produced, that the destruction of the deed by cancelling, necessarily drew after it the destruction of the interest itself. A contrary opinion, however, was given by the author of the above observation, when sitting as judge in the case of *Maggennis v. Maccullough*,^(p) where his Lordship held, that "a lease for years cannot be surrendered by cancelling the indenture merely, and without writing; because the intent of that statute was to take away the manner they formerly had of transferring interests in lands, by signs, symbols, and words only; and, therefore, as a livery and seisin on a parol feoffment, was a sign of

(p) *Gilb. Eq. Rep.* 236.

passing the freehold, before the statute, but is now taken away by the statute ; so the cancelling was a sign of a surrender, before the "statute, but is now taken away, unless there be a writing under the hand of the party." * [252]

As the statute does expressly declare that cancelling a deed shall operate as a legal surrender of the lease, to deduce a consequence by argument, from its particular provisions, in prejudice of its general object, seems to be a very questionable method of exposition ; and on this ground, perhaps, the reader will think that the opinion of the Chief Baron last above stated, and which was judicially delivered by him, is entitled to the preference, as well on principles of law, as on account of the more solemn occasion of pronouncing it.

But though, as a general position, what fell from the Chief Baron, in respect to the inadequacy of signs and symbols, to effectuate a transfer of lands, either by surrender or otherwise, since the statute, appears to have been good law, yet it seems there may be particular cases, wherein a court of equity will lend its aid against the statute, to validate a surrender accredited only by these ostensible marks. Thus, in the case of *Knatchbolt v. Porter* (q) Sir George Moore being lessee of a house in Hatton Garden, at 60*l. per annum*, assigned his term to Porter, who covenanted in the assignment to indemnify him against the covenants in the original lease. Sir Charles Rich bought the reversionary interest of the lessor, and treated with Porter to surrender the term, and an assignment was made betwixt them, for that purpose, and the key delivered and accepted : but afterwards, Sir Charles Rich, altering his purpose of living in the house, it stood empty for some years, and then he brings a bill against Sir George Moore, who was the original lessee, to compel him to admit an attornment, in order to his bringing his action at law for the rent ; but Porter was made no party to that suit ; however, Sir George Moore, in his defence, insisted upon "the agreement made between Sir Charles Rich and Porter for the surrendering of the lease, and that the key was delivered pursuant thereunto, &c. But he was overruled in that matter at the hearing, and it was declared he should go to a trial at law, and admit an attornment ; but Sir George Moore's attorney pleading that Sir George never attorned, upon the plaintiff's coming back into this court, it was decreed, Sir George should pay the rent arrear, amounting to about 400*l.* *Knatch-*

bolt, the executor of Sir George Moore, brought his bill to be reimbursed against Porter, according to his covenant on the assignment, on which he could not recover at law, by reason that Sir Charles Rich could not at law have recovered of Sir George Moore, for want of an attornment. Porter, by answer, set forth the agreement made with Sir Charles Rich, for surrendering his term, and delivery of the key, and his acceptance of it, &c. and therefore insisted he ought not to be charged, and the court now, upon the hearing of the cause, was of opinion, that the agreement was well proved, and a good discharge, and Porter not liable to answer any rent after that time: and though the court had decreed otherwise against Sir George Moore, yet Porter, being not party to that suit, was not bound thereby, and therefore, without any regard to that decree, they were to judge upon the case then before them, and saw no reason to relieve the plaintiff.

Of surrenders in law.

As the section we are upon, makes an express exception of surrenders, which take effect by operation of law, a knowledge of *what constitutes* a surrender in law seems necessary to a right understanding of this branch of the statute. The science of law, whether derived from statute or custom, is a science of rules rendered flexible to the varying wants and relations of mankind, in a state of society more or less complex, by a multitude of exceptions and controuling distinctions; the statute of frauds, framed in an æra of social and political advancement, has much of this modified character, and will, therefore, be very superficially understood, unless the boundaries of its application are as well known, as its *positive enactments. When we are told, therefore, that all virtual surrenders, or such as have their operation by construction or consequence of law upon the acts of the parties, remain as they stood at common law, we require also to be instructed with respect to the true notion to be entertained of a surrender at law. In the case of *Magemis v. Macéullough*, (r) above cited, the Chief Baron, in considering the surrender by cancelling as out of the exception, construed the words by act or operation of law, to intend only that virtual surrender which is wrought by the taking of a new lease or interest, which, being in writing, is of equal notoriety with a surrender in writing. And this exposition and limitation seems to agree with the cases and authorities. If a lessee for life or years accepts a new lease in writing,

* [254]
That they remain as at common law.

from the lessor, the original lease is forthwith surrendered by operation of law. And as this effect seems capable of being produced in two ways, viz. by implication or construction, and by the technical consequence of merger by union of estates, it will be proper, therefore, to have regard to these distinct consequences.

A surrender in law of a lease in possession is implied in the acceptance of a new lease from the reversioner; for if the lessee accept a new lease from his lessor, he admits and affirms his lessor's ability to make such new lease, which could not be done by him, if the old lease stood in his way. Upon this principle, if a lessee for twenty years, or any greater number, takes a new lease for ten or any smaller number, to take place during the period of the first, the first term of twenty years is thereby determined,^(s) because the lessee having made a lease for a longer duration, was incompetent to contract for another lease in possession, while the former remained unsurrendered; the surrender, therefore, of the longer lease is implied from the necessity of the thing, and the surrender of the *whole* is implied, because the contract was *entire*, and incapable of being divided or avoided ^{for part}, and left standing for part. And though such second lease were made to commence *in futuro*,^(t) as an *interesse termini*, to take effect during the first lease in possession, and not in reversion, the same consequence by construction must take place, for it equally imports an admission and affirmance of the lessor's ability to make a new contract. And upon the same reasoning, if before the statute of frauds such second lease were made by parol,⁽⁹⁶⁾ it would operate as a surrender of the first.

But looking to the same principle of construction, it seems clear that since the statute, such parol lease, if for more than three years, being incapable of conveying any interest beyond an estate at will, would not afford a ground for the implication of a

That the proper example of a surrender in law, is, where the lessee accepts a new lease, in writing, before the end of the existing lease.

Of these examples, with their reasons and variations.

* [255]

(s) Cro. Jac. 84, *Gybson v. Searles*, 2 Roll. Abr. 496. (t) 2 Roll. Abr. 496; and Cro. El. 605, *Hutchins v. Martin*.

(96) 2 Roll. Abr. 496. The note to the 11th edit. of Coke Litt. does not seem to be correct in supposing it necessary, in order to produce this surrender by implication, that the second contract should be of *as high a nature as the first*. Vide note 296.

surrender ; for as the interest is built upon intention, it seems to follow, that if such lease does not pass an interest according to the contract and intention of the parties, the acceptance will be no surrender in law of the subsisting lease ; upon which point the judges seemed to agree, in the case of *Wilson v. Sir Thomas Sewell*,^(u) relying upon the authority of *Lloyd v. Gregory*, which they cited from Sir William Jones's Reports.⁽⁹⁷⁾

* [256] It should be observed, however, that although a lease, not by deed, granted to take effect during a subsisting antecedent lease, and falling short of it in extent and duration, if given to a stranger, is necessarily void, as has been shown at the *beginning of this chapter ; yet that, if it be given to, and accepted by the prior lessee himself, it will operate as a virtual surrender of his subsisting lease, and take effect in him by substitution ; for it is only considered as void in law, because of the subsisting lease, which absorbs all that it affects to give ; the removal, therefore, of that interest out of the way, makes room for it to operate ; and, to set up that as an obstacle, the removal of which is supposed between the parties interested in the new grant as well as the old interest, would be to contradict the intention where the law allows intention to govern the construction.

The reader should be reminded also, that in this last supposed case of a new lease to the lessee made by writing, without deed, and for a term of shorter duration than the subsisting lease, as no reversion can be supposed to be carried by it, but only an *interesse termini*, nothing is passed which can merge the possession of the first lease ; the surrender of it can, therefore, only be wrought by implication from intention ; whereas, if the second lease, though of shorter duration than the first, had been made by deed poll, or indenture, inasmuch as such a conveyance was capable of carrying the reversion to which the rents and services might be incident, it seems that there would be room for considering the first lease as merged in the reversion ; for an union of the reversion, with the possession, though for ever so short a time, seems in law to merge the subordinate interest.^(x) But if the second lease, though made by deed, is not

(u) 4 Burr. 1980. (x) Plowd. 151.

(97) 405, 406, and see 2 Roll. Abr. 495, (F.) pl. 7, where the same case is referred to by the name of *Fludd v. Gregory*.

to commence till the first is expired, no merger will take effect, as appears by the anonymous case in Anderson's Reports,^(y) where a lessor lets his lands to A for life, and two years over; and afterwards let the same lands to B for forty years, to commence after the death of A, and the end of the term of twenty years; and B intermarried with A, and A died, so that the term of twenty years was left in B; yet as the term of forty years was not to commence till the first lease was ended, there was no merger by union of the terms.

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*But if a lessee takes a second lease from his lessor, to commence before the expiration of the first, though the second lease is of less duration than the first, and is, moreover, made subject to a condition, which is afterwards broken, so that the lease becomes void, yet the first lease is irrecoverably merged and gone by the acceptance of the second, as appears by Coke Litt. 218*b*. where it is said, that if a man make a lease for forty years, and the lessee afterwards takes a lease for twenty years, upon condition, that if he do such an act, that then the lease for twenty years shall be void, and afterwards the lessee break the condition, by force whereof the second lease is void, nevertheless the lease for forty years is surrendered, for the condition was annexed to the lease for twenty years, but the surrender was absolute. So it is, if a man make a lease for forty years, and the lessor grant the reversion to the lessee upon condition, and afterwards the condition is broken, the term is absolutely surrendered; for a condition may be annexed to a surrender, and revert the particular estate, because the surrender is then conditional; but when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender is absolute.

If the lessor grant the reversion to the lessee, upon condition, the first lease is merged, and not capable of restitution, though the condition is afterwards broken.

But the doctrine of merger supplies a principle to which only certain instances of these surrenders in law can be reduced: the implication of intention from the acts of the parties, is the only legal foundation which will support them in all their extent. In *Mellows v. May*,^(z) the case upon the special verdict in trespass was thus: Ralph Mellows and his wife, being lessees for life of lands, the lessor, by indenture between himself and the said lessees, and J, their son, let the same lands to the husband and wife and son,

And even if the second lease be void, yet a surrender of the subsisting lease may be effected by it.

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habendum a die datus, for their lives, and made livery two days afterwards *secundum formam chartæ*. And there were two questions, viz. whether the second lease were good or void; and if void, whether it was a surrender of the first lease. It was resolved by all the court, that the second lease was void, forasmuch as it was **habendum a die datus*, and the livery made so long after it would not help it. (98) But yet they agreed, that it was a surrender of the first lease, though itself was void; for the acceptance of the indenture in contracting, and the agreement to have a new lease, made a surrender of the first lease. And Walmsley said, that if a lessee for life or years takes a lease at will, a surrender would be wrought upon the same principle.

But if such second lease, though not intrinsically void, be ineffectual by reason of the lessor's inability, it will not operate as a surrender of the first lease.

But yet, according to the case of *Watt v. Maidwell*, (a) if such second lease be void, not by reason of its own infirmity, but the disability of the lessor, it will not operate a surrender of the first lease. Thus, therefore, where a man made a lease for forty-one years by indenture, dated the 14th November, 1616, to A, to commence from the annunciation, which should be in the year 1619, and, afterwards, in the same year, by another indenture, bearing date the 3d of December, made a lease to B for 99 years, to commence from the annunciation then last past, by virtue whereof B entered and was possessed, and then the lessor, by another indenture, made the 16th of November, 1617, made another lease of the same lands to A, to commence from the 17th of November, 1619, for forty-one years, which was accepted by A, who, after the commencement of his term, entered and was possessed, and made his will and died, and his ex-

(a) Hutton, 104.

(98) This, however, does not appear to be law at the present day. The courts have determined, that if livery be made by the lessor *after* the date of the deed, it shall controul the express day in the deed, and make such lease *habendum a die datus* good. For it shall not be understood to pass till the livery, and then it might commence presently, and would not be a freehold granted to commence in future. See the case of *Freeman on dem. Vernon v. West*, 2 Wils. 165. And the same effect will be produced if such livery *after* the day is made by attorney, *ibid*. Therefore, the distinction in this respect to be found in the *Touchstone*, 215, seems not to hold with reason or law. Et vid. *Palm*. 30; *Dean and Chapter of Worcester's case*.

ecutors let to the plaintiff, and the only question was, if the acceptance of the second lease by A had determined, *discharged, or extinguished the first lease, so as to let in the intermediate lease to B; it was adjudged, that it had not, because, by the lease to B for ninety-nine years, and his entry, the lessor had but a reversion, and could by his contract afterwards with A give any interest to A; and the first lease to A was good as a future *interesse termini*, to take effect in possession when the time came, and, thereby, *pro tanto*, to defeat the lease for ninety-nine years to B; and if it had not been for the lease to B, there would have been no question but that the first lease to A had been, by the acceptance of the second lease, surrendered, but that the intermediate lease, being for so great a number of years, disabled him, during that time, from contracting for any less number of years, as a lease for forty-one years only.

This surrender, by implication, being, as it seems, wholly founded on the supposed intention, may be reasonably inferred, wherever the new interest is inconsistent with the subsisting lease; there are, accordingly, many examples in the books of surrenders taking place upon this principle of construction, where the doctrine of merger, is as much out of the question as in the case above-mentioned, wherein a second lease, though void in law, operated as a surrender of the first.

If a man accepts from his lessor a new interest, which could not have been effectually granted to him, without his having previously relinquished his interest under the demise, the law will interpret his acceptance of the new benefit into an abandonment or surrender of the old.

Quando aliquis per chartam aliquod accipit, omnia fecisse videtur sine quo res esse non potuit. Thus, where the lessee for years of an advowson was presented to the advowson by his lessor, it was adjudged to be a surrender of his term,^(b) on the same principle on which it is held, that if a copyholder in fee, takes a lease from his lord of the same land, the copyhold^(c) is extinguished *in perpetuum*.⁽⁹⁹⁾ So it has been adjudged, that if a lessee *takes a

Of the extent of the doctrine of surrenders by implication.

Of the surrender implied from the inconsistency of the second with the first interest.

* [260],

(b) 2 Rep. 17 a.

(c) 4 Rep. 31 b.

(99) But if the copyholder takes a lease for years, of the manor itself, this is but a suspension of his copyhold during the term. And note, in this diversity, how much more extensively the implication from intention operates than the doctrine of merger.

grant from his lessor, of a rent-charge out of the same land, or of common, or even of estovers, his lease is surrendered in law. And the same consequence by implication from his acts will arise, if he accepts a new lease from his lessor, *de ventura terra.*(d)

The consistency or inconsistency of the two interests, furnish the criterion for judging whether a surrender is or is not produced.

Upon this ground of making the consistency or inconsistency of the several interests the criterion for judging whether a surrender has or has not been produced, it was determined, that, where a lessee for years, accepted a grant of a rent from him in the reversion, payable at such feasts, but without any time limited for its commencement, this was no surrender of the lease, because it did not appear but that it might be intended that the rent should take place, out of the reversion, *after the expiration of the lease*;(100) but if the rent was granted to commence at a certain time *within* the term, such acceptance thereof by the lessee, would work a surrender of his lease.(c) Again, if a lessee for years accept a lease from his lessor, of all his lands in D. (where the premises in the first lease lie) this is no surrender, because of the possibility that other lands, exclusively of those comprised in the first lease, were only intended. And there must be a *necessary* inconsistency in the interests to make a surrender in law. Therefore, if a lessee for years of a manor, is made bailiff or steward thereof, this has been adjudged to be no surrender of the term;(101) for a bailiff or steward has no interest, but *merely* an office collateral to the land, and, furthermore, it is no permanent thing, but determinable at the pleasure of the lord.

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A new lease of part of the lands already in lease, operates a surrender of that part only.

Upon the same reasons, if a lessee for years of lands, accepts a new lease, by indenture, of *part* of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases, for any more than that part only, which is so doubly leased; and though a contract for

(d) 2 Roll. 496. (c) 2 Roll. Abr. 496. in Sible and Serle's case, *per curiam*.

(100) Such original grant of a rent *de novo* is good, but a grant of a rent-charge *in esse* to take place in future, would not stand with the law. See Plowd. 156. Bro. tit. Grant, 86. Palm. 29.

(101) See *Gybson v. Searl or Searls*, Cro. Jac. 84, 176, which seems to be the same case as that cited in 2 Roll's Abridgment, 496, by the name of Sible and Serle's case.

years cannot be so divided or severed as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or by operation of law, yet the land itself may be divided or severed; and the lessee may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue shall stand good and untouched, because, in such case, the contract for the residue remains entire; whereas, in the other case, the contract for the whole would be divided, which the law will not permit.(f)

In correspondence with these reasons on which this surrender, by operation of law, has been properly grounded, this species of surrender will, in some cases, be found to have a stronger effect than an express surrender by deed. Thus, according to Lord Coke,(g) if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown, but by a surrender in law it may be drowned; as, if the lessee before Michaelmas take a new lease for years, either to begin presently or at Michaelmas,(102) this is a surrender in law of the former lease.

The surrender by implication has, in some cases, a stronger effect than the express surrender.

*PART III.

* [262]

Conveyances of Lands.

HAVING treated at some length of those interests in lands, which, by virtue of the second section of the statute of frauds, may yet be created without writing, and of the modes by which interests in lands may be surrendered, the next subject of review will be the operation of the same statute on *conveyances, assignments, and transfers* of lands, which will properly form the last head of this fourth chapter. A short outline of the history of the changes which have taken place, under the influence of preceding statutes, seems proper to introduce the reader to this subject of the provisions of the statute of frauds; in tracing which

Of the progress of the power of alienation among our ancestors.

(f) See 4 Bac. Abr. 217. 2 Roll. Abr. 498. (g) Coke Litt. 338 a.

(102) Which seems contrary to the book, 3 H. 6, 18, where it is said, that the acceptance of a future interest, is no surrender of another future interest. See 2 Roll. Abr. 496, pl. 12.

[263] outline, the object of the writer will be, only to show the steps whereby the legislature has advanced to those cautious requisitions, to which it has, by the first and third sections of this statute, subjected all transfers and assignments of lands and tenements; and by the seventh and ninth sections, all creations and assignments of trusts and confidences of this description of property. One is tempted, on a subject of so much curiosity, to carry back the inquiry to those infantine stages of society, in which the newly acquired agricultural interests in land first established the notions of property in the immoveable possession of the soil itself; to contemplate the jealousy of alienation, founded upon the relation and exclusive union of blood and family, by which the first ages of the world appear to have been characterized,⁽¹⁰³⁾ and which seem to have been as old as property and society itself; and again, to observe this jealousy branch out into positive prohibitions, when the feudal principles ^{*}of restraint were ingrafted,^(h) among our northern progenitors, on these primitive propensities. The temptation is still greater, to trace the gradual liberation of property from these narrow limitations, under the influence of an expanding intercourse, and the progress of commercial communication: and to pursue the progressive steps from an almost absolute restriction of alienation, to the first apprehension of a distinction between acquired and descended property,⁽ⁱ⁾ and between socage and military fiefs,^(k) and, at length, to that liberal subjection of lands as well as moveables to the demands of commercial interchange in the burghs and trading cities; which so spread the appetite for alienations in this country, that, in an æra of young, though ripening policy, the frequency of the practice became an article of coercion in the great charter itself.⁽¹⁰⁴⁾ From these embryo struggles of trade, which an-

(h) See Lib. feud. 5 tit. 13, 4 tit. 45, edit. Cujac. (i) Lib. feud. 4 tit. 45, edit. Cujac. Leg. Hen. 1, No. 7, Glanv. lib. 7, c. 1. (k) Bract. lib. 2, cap. 5, s. 4.

(103) See in the fourth chapter of the book of Ruth, an example of the *Jus Retractus*, and the anxiety to redeem the family inheritance. See also the 22d chapter of Jeremiah.

(104) Cap. 32. It is remarkable, that in the reign of Edward the Second, the statute of *prerogativa regis*, borrowed from Magna Charta an unjust exception for the prince out of the statute of *quia emptores*, by reviving the clause of restraint upon alienation as against the vassals

nounced the future birth of a system that was to triumph over every prejudice and every badge of feudal servitude, it would be interesting and instructive to carry our regards to the early display of the same spirit prompting to alienations, but still on the feudal plan, by subdividing and multiplying the feudal tenures and relations, till, in the intelligent reign of the first Edward,⁽¹⁾ the statute of *quia emptores* combined the power of alienation in the vassal, with the preservation of the fruits of the tenure to the lord.

*The progress and successive periods of the decay of these tenures, from the passing of the act of *quia emptores*, to the final destruction of them by the 12th of Charles the Second, when the removal of the restraint upon testamentary disposition, the last surviving bar upon the alienation of landed property, was incidentally accomplished by the abolition of military services and tenures, exhibits the rapid evolution of the wisdom of our ancestors in a view too striking not to have tempted the writer to hazard a digression in this part of his work, upon these objects of inquiry. He yields, however, to the pressure of haste, and the apprehension of consequent error; and ventures only, upon a short sketch of those legislative provisions, which, as the power, of alienation has expanded itself, have become necessary to prevent secret and precipitate transfers to the prejudice of the rights and claims of third persons, or the interests of the parties themselves.

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In the rudest state of society in this country, some solemnity beyond mere words importing the consent of the parties, was necessary to the transfer of property in land; the object of which solemnity was to give notoriety to a transaction that was to determine the reciprocal rights and obligations of mankind in respect to this important description of property. The fruits of tenures, the claims of persons having right, the recovery of debts, the security of tenants, have, at different times, with different weight,

(1) 18 Ed. 1.

of the crown *in capite*. But note, that this revival did not extend to the tenants in soccage of the crown; and that by the 1st Edw. 3, c. 12, this exception in favour of the prince was, in effect, repealed.

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been strong arguments for the notoriety of conveyances of land in every stage of the law in this country. With regard to moveables, the things being of themselves capable of manual delivery and subtraction, a parol expression of consent seemed at all times sufficient to consummate and publish the transfer; but where lands or houses are the subjects of the conveyance, the transferee must come to the thing, which remains stationary and unchanged, and the conversion of the property and change of title require to be effected and promulged by an ostensible relinquishment by the one party and occupation by the other, accompanied by expressions to testify the intention, and to *make the transaction amount to a delivery of the possession. In the first ages, indeed, of man in his social state, the history of most nations makes mention of authorised ceremonies accompanying the transfers of property in land, sometimes popular and arbitrary, and sometimes judicial, and transacted before magistrates.^(m) As the possession of land carried with it, in the feudal times, a reciprocity of personal duties, some notoriety and solemnity in the conveyance of this species of property, seems to have been very proper under a system of polity, in which the transfer of land implied an investiture as well as a grant. The subject of these transmutations being either corporeal or incorporeal, and things untangible and incorporeal being incapable of actual delivery, the notoriety of this actual delivery was, therefore, where the subject was not corporeal, supplied by the solemnity of an instrument in writing, sealed and delivered. Such things were said to lie not in livery but in grant, as reversions, remainders, rents, advowsons, commons, and such like hereditaments. But manors, houses, and lands, being things of a corporeal existence, and susceptible of a specific transfer, were therefore necessary to be transferred by livery of seisin. While society was in its rudiments, and writing uncommon, the notoriety of the livery was chiefly relied upon till the formality of a written instrument came into use, as an authentication of the livery and seisin, and brought with it some relaxation of the old ceremonies.

The first feudal grants are said to have been gratuitous, whereby the donor parted only with the *dominium utile* or *usufruct* to

(m) Vide Heineccius, Rom. Antiq. lib. 2, tit. 1, No. 19, 20; and see the 23d chapter of Genesis.

the vassal, reserving to himself the *dominium directum* ; and, on account of the favour which prompted the gift, there seems to have been much humility in the form of acceptance by the donee, who, being chosen for his personal qualifications or deserts, received from the hands of the superior himself his investiture, (therefore called the *investitura propria*) in the *presence of the *parces curie*, and on the land itself, with a rigorous exaction and observance of those circumstances of ceremony, which were calculated to impress the memory of the transaction on the witnesses. The first departure, in practice, from the rigour of the primitive observances, seems to have been a *symbolical* delivery of the possession ; though from the great inconvenience, in many cases, of making the corporeal transfer, this substitution must be but little short of the antiquity of the direct method by livery and seisin on the land itself ; and, indeed, it seems to have been the usage of very remote times.(105) As it was the intention of the words, which were used before writing was adopted, to declare the tenour of the grant, and the nature and obligations of the investiture ; so, when the practice added writing to the transaction, such writing did only record the fact and the intonation of the parties, in a form extremely short and simple.(106)

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It is easy to apprehend how rapidly this simple document would assume a more complicated shape, and modify itself to the more intricate wants and interests of mankind, by qualifying the grant with express stipulations and conditions. And we can readily suppose that it would soon make the principal figure in all conveyances of land, and become the standing evidence of the change of the property. It was the natural effect of this altered state of things, to subtract from the feudal investiture much of its sanctity and and publicity ; the *improper investiture*, as it was called, being received from the *attorneys or stewards of the lord, instead of the lord himself, came into common practice ; the attestation of common witnesses, instead of the *parces curie*, was re-

* [267]

(105) Thus the delivery of a shoe, was the symbol of the transfer of the land of Elemelech to Boaz. The purchase by Jeremiah of Hanameel's field, was ratified by an instrument, subscribed and sealed, chapter 22, but this seemed to be only a memorial of the transaction, and a method of recording the testimony of the ocular witnesses.

(106) See the account of the *breve testatum* in the book of feuds, 1 tit. 4. and Craig, lib. 2, Dieg. 2, No. 16.

ceived ; and, as these witnesses, being not the *parces curie* of the particular manor, served as well for one as another, all the lands lying in one county, and intended to be conveyed, might pass by the livery of one parcel in the name of them all.

The ancient form of conveyance thus gradually declined from the dignity of the *propter investiture*, and yet, slight as it had become in respect to its ceremonial, the ingenuity of men was very early at work in inventing substitutionary methods of evading the necessity of making the livery of seisin by themselves or their attorneys. It is said by a sensible writer,⁽ⁿ⁾ that "earlier than the time of Littleton, it had come into fashion to transmit land by attornment, if there was a tenant, and by a lease and release if there was none ; in the first of which cases, the form of getting the consent of the tenant of the ground, to the transfer, supplied the place of that livery, which could not be given ; and, in the other case, the grantor gave to the grantee an imaginary lease, in order to put him into possession, and the next minute released."

* [268] In each of these methods by attornment,⁽¹⁰⁷⁾ and "lease and release, an act was done of an ostensible kind to notify the change of property ; for the attorning in one case, and the actual entry upon the lease in the other, was still a *ceremony*, though but

(n) Dalrymple on feudal property, ch. 6, sect. 3.

(107) The ceremony of attornment seems at all times to have produced more danger than security to property. The statute 4 Ann, c. 16, s. 9, has, therefore, made all grants and conveyances good without attornment, and thus removed the necessity for making it : but its efficacy as an act of notoriety and evidence yet remained, and, as it appears, continued to be made an ill use of ; for the statute 11 Geo. 2, c. 19, s. 11, reciting that the possession of estates was rendered very precarious, by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors, who are thereby put out of the possession of their respective estates, and put to the difficulty and expense of recovering the same by action at law ; it is, therefore, thereby enacted, that all such attornments shall be void, and the possession not altered ; but it is also thereby provided, that the same act shall not extend to affect any attornment made pursuant to any judgment at law, or decree, or order of a court of equity, or made with the privy and consent of the landlord or landlords, lessor or lessors, or to any mortgagees after the mortgage has become forfeited.

slight in comparison of the old formalities which took place upon the feudal feoffment. While the ancient forms of transmission and investiture were thus declining into shadows, the practice of creating secret trusts and confidences, (for such were uses at the common law) for evading the pressure of the feudal burthens, which were daily becoming less tolerable, as social and political changes diminished their utility and their recompence, and for escaping the consequences of attainders and convictions, which multiplied with the contests of factions and the struggles of liberty, was threatening to become universal. "Which practice," says Lord Bacon,(o) "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his curtesy, the lord of his wardship, relief, heriot, and escheat ; the creditor of his extent for debt, and the poor tenant of his lease."

The method pursued for remedying these inconveniences, while it failed of accomplishing its immediate purpose, nearly caused all the ancient notorious method of transfer, and even its very shadows and substitutes, to disappear, by giving effect to new and secret conveyances. The statute of the 27th Hen. 8, c. 10, called the Statute of Uses, which had been "preceded by many partial attempts to attain the same object,(108) by fastening upon the interest of the *cestui que use* the same obligations, and subjecting it to the same remedies in a variety of particular instances, as had before accompanied exclusively the legal ownership, at once identified the use with the legal property in the land, or, as

• [269]

(o) Use of the Law, 153.

(108) To remedy the inconveniences of these creations of uses and trusts, in respect to lands, a multitude of statutes were enacted for making the *cestui que use* to be considered, for the particular purpose then in the contemplation of the legislature, the real owner of the land. Thus, the 50th Edw. 3, c. 6, 2 Ric. 2, sess. 2, c. 3, 19 Hen. 7, c. 15, subjected the land to be extended by the creditors of *cestui que use* ; 1 Ric. 2, c. 9, 4 Hen. 4, c. 7, 1 Hen. 6, c. 3, 1 Hen. 7, c. 1, allowed actions for the freehold to be brought against the *cestui que use* if in the actual pendency of the profits ; 11 Hen. 6, c. 5, made the *cestui que use* liable to the action of waste ; 1 Ric. 3, c. 1, gave legal effect to his conveyances and leases, made without the concurrence of his feoffees ; and, 4 Hen. 7, c. 17, 19 Hen. 7, c. 15, made him answerable for the feudal perquisites, and gave the lord the wardship of his heir.

it is expressed, "transferred the use into the possession;" the operation of which statute is better described, as annexing the possession to the use. Before this statute, *equitable* estates were created without *livery*, or *entry*, or *attornment*, and by virtue of this statute, these equitable estates, as soon as they were created, became clothed with the legal interest, so that *legal* estates became grantable without *livery*, *entry*, or *attornment*. The bargain and sale came now, therefore to be the general method of conveyance, which, having once raised the use upon the valuable consideration, left the statute to do the rest of the work; and so completely does form and solemnity seem, at this juncture, to have been lost sight of, that it appears, according to some authorities, and that of Lord Coke among others, that even lands might, in the interval between the statute of uses and enrolments, have been transferred by a parol bargain and sale. ^(p) Nor does it appear

* [270] that such unsolemn modes of conveyance, where the customs of boroughs have sanctioned them, received a decided and universal prohibition till the great statute of Charles the Second, which is the subject of this treatise, was enacted. In the mean time, it should be remarked, that the evil, which it was the direct purpose of the statute to prevent, eluded its intention in the new shape of a trust, the courts having determined a use upon a use, not to be executed or converted into the legal estate by the statute. The easy and informal transfer of real property, by the secret method of a bargain and sale unrecorded, called for the legislative interference by the statute of enrolments, whereby it was made ^(q) necessary to register in court these conveyances of the freehold, which were thenceforth required to be in writing, under seal. But this statute omitted to extend its provisions to bargains and sales for terms of years, the consequence of which omission was, the total disappointment of its salutary purpose by the conveyance by lease and release, not then, indeed, for the first time invented, but for the first time founded on a lease made by bargain and sale, to save the necessity of the entry, by the help of the use executed by the statute.

Amidst all these changes, however, under which the old feudal fabric of conveyance had sunk into desuetude, the transfer by parol, if the act of livery accompanied, existed potentially, till the sta-

(p) See 2 Inst. 675, 1 Leon. 13.

(q) 27 Hen. 8. c. 16.

tute of frauds and perjuries, by the clauses which form the subject of this chapter, imposed universally the necessity of writing upon all conveyances of lands, or interests in lands, for more than three years. As the registering was avoided by the lease and release, so the necessity of writing might have been eluded by parol declarations of trusts, but the statute of frauds and perjuries had this danger also in view, and by the 7th and 8th sections, already treated of in a separate chapter of this treatise, made all actions, declarations, and assignments of trusts, void ; and, upon the whole, the statute would have restored the notoriety without the inconvenience of the feoffment by livery of seisin, had it seemed, in other respects, proper to the framers thereof, to have extended the provision to the registration and recording of what it has required to be in writing. (109)

* [271]

The passing of this statute is, however, properly regarded as a new and important era in the law in respect to contracts, trusts, and translations, of or concerning property in land ; and past experience having proved the fertility of invention in suggesting means of eluding similar restraints, the courts seem resolved to make the wisdom of this law effectual, by discountenancing subtle distinctions and evasive exceptions. Epithets of a harsh kind have sometimes been thrown upon it ; and to some it has seemed to be a miscellany of unconnected provisions : its objects were certainly numerous and extended, and subsequent experience and modern refinement may find something in the matter to be supplied or altered, and something in the language to be corrected, but a general and simultaneous view of its enactments, will disclose, to the diligent and unpretentious student, a totality of plan and structure, and a wise and uniform purpose of protecting and purifying the daily commerce of mankind.

(109) By an act of the 2d Ann, c. 4, a register is directed to be kept of all deeds and conveyances affecting lands in the West Riding of Yorkshire. Another statute of the same Queen, 6th Ann, c. 35, has established a similar register in the East Riding. A third, viz. 7th Ann, c. 20, does the same for the county of Middlesex. And, by the statute 3 Geo. 2, c. 6, the benefit of a similar provision is extended to the North Riding of Yorkshire. Registration has been made universal in Scotland, and, as it appears, with great advantage to that country. See Dalrymple on Feuds, chap. 6, sec. 4.

The temptation, indeed, to convey so important a property as land without writing is but small ; even when the talent of writing was rare, the livery of seisin was seldom unaccompanied
 * [272] by the charter of feoffment ; but as the use of this *accompanying instrument, by becoming *general*, did not, therefore, become *essential*, while, on the other hand, it made the livery a transaction of less impression and solemnity, the possibility of swearing a man out of property of land seemed to be such as might prove a temptation to the needy and profligate. An end, therefore, has been anxiously put to the chances and opportunities of both fraud and perjury, in respect to the conveyance of interests and estates in land, except as to a lease for three years, which is all that is left to the uncertainty of verbal testimony.

Whether the
transfers of
mortgages
are within
the statute.

It is true, the author of a vigorous treatise on the subject of mortgages has said, in that work,^(r) that mortgages are not considered as conveyances of land, within the statute of frauds ; but this seems to be a hasty position, or one in which the writer has imperfectly expressed his meaning. It should seem extraordinary, indeed, that with respect to that part of the complex transaction called a mortgage which consists of the conveyance of the land itself, the statute of frauds should be restrained from applying to it ; and if the authority of a great name could be produced in support of such an assertion, the fidelity or accuracy of the reporter ought rather to be suspected, than that such an anomaly should receive credit.

At law a mortgage is a conditional sale of the land : in equity it is regarded only as a security for the debt : as, therefore, the debt is the principal, the translation of the interest therein necessarily draws after it the interest in the land in equity ; by the assignment of the debt, the interest of the original mortgagee in the pledge, is transferred to the assignee, and thus, by a consequence of a principle in equity, the interest in an hereditament may be transferred without writing, notwithstanding the statute of frauds. By the assignment of the debt, the interest of the land becomes transferred in equity, through the medium and circuituity of a trust, and this being a trust arising by operation of law, it comes justly *within the express exception out of the
 * [273] 7th section of the statute.

(r) Powell, 187.

The case of *Richards v. Sims*,^(s) cited by the same author, in support of his position, that mortgages are not to be considered as conveyances of land within the statute of frauds, turns very evidently upon this view of the question. The facts sworn to in that case were, that the mortgagor went to the house of the mortgagee with the box of writings, wherein the mortgage and bond were, and offered them to the mortgagee, but the mortgagee put the deeds back, saying, "take back your writings, I freely forgive you the debt;" and then speaking to the mortgagor's mother, who was present, said, "I always told you I would be kind to your son; now you see I am as good as my word."—The Lord Chancellor, upon this evidence, observed, that the rule on this head was the same, both at law, and in equity; and that his opinion was, that it might be admitted. That the statute, indeed, had laid down a very strict but proper rule, relating to real estates, viz. that no interest for any longer than three years should pass in them without writing, nor any trust in them for a longer time, unless the trust arose by operation of law.—That where a mortgage was made of an estate, it was only considered as a security for money due; the land there was the accident attending upon the money, and when the debt was discharged, the interest in the land followed of course. In ejectment, where a title was made under a mortgage, if evidence was given that the debt was satisfied, this was considered as defeating the estate which the mortgagee had in the land, and in such cases, especially where the mortgage was ancient, the court would presume that the money was paid at the day; and would direct the jury to give their verdict accordingly,⁽¹¹⁰⁾ unless it clearly ap-

(s) Bernard, 90.

(110) This would be presumption sufficient, if the mortgage was for a term of years only, conditioned to become void upon payment at the day; but if it was made by a conveyance of the fee, it follows, that the direction to the jury must be to presume not only that the money was paid, but that the hereditaments were re-conveyed. So, after forfeiture, a satisfied term may be presumed to be surrendered; but unless such presumption can take place, such outstanding term will be a bar to the title of the person claiming subject to it, in an ejectment brought by him to recover the possession, as appears to be settled

peared, that the *money could not be paid at the day. No writing was in these cases necessary, which showed that, even at law, the debt was considered as the principal, and the land only as the accident. Equity went farther, and in all cases said, that when the debt appeared to be satisfied, there arose a trust by operation of law, for the benefit of the mortgagor. That the case was within the exception in the statute of frauds, as to trusts arising by operation of law; and, in this sort of cases, the court received any kind of evidence of payment; therefore, if a mortgage was made by one partner to another, and the mortgagor agreed with the mortgagee that he should take a certain part of the profits of the partnership, in discharge of the mortgage, that of itself would discharge it. Here was a mortgage made and a bond at the same time entered into for the performance of covenants. Suppose an obligee delivered up a bond, with intent to discharge a debt, the debt would be certainly discharged; and if the bond was discharged in the present case, the debt would be discharged with it; accordingly, his Lordship directed an issue to inquire whether these expressions were used or not, the evidence as to this point being doubtful.

That the mortgaged estate in equity follows the debt.

* [275]

When it was said by the Chancellor, in the above case, that the rule was the same both at law and in equity, we *must suppose him to advert to the presumption of the reconveyance or surrender of the interest at law, and the annexation of the trust in equity, as the media by which the interest in the land is made to follow the debt in those respective judicatures; and when his Lordship is made to say that equity goes farther, he must be understood to mean, that in all cases, and consequently in some where from certain repelling circumstances the presumption at law could not arise to produce the effect of a reconveyance of the legal estate, the courts of equity would compel the formal transfer of the interest at law, and, in the mean time, clothe it with a trust for the party entitled. And it seems that we must so understand Lord

law since the case of *Doe on dem. Hodsdon v. Staple*, 2 T. R. 684; and see the case of *Goodtitle on dem. Jones v. Jones*, in error, 7 T. R. 47, in which last case it appeared, by the special verdict, that the term was outstanding in a trustee who was not joined in the ejectment. Where a term has been assigned to protect the inheritance, it seems difficult to comprehend how this presumption of surrender can arise.

Mansfield, when, in speaking on the same subject, his Lordship observes, "that whatever will give the money, will carry the estate in the land along with it, to every purpose; that the estate in the land is the same thing as the money due upon it; it will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence: nay, it will do it, though the debt were only forgiven by parol; for the right to the land would follow, notwithstanding the statute of frauds."⁽¹⁾

If the mortgage debt is assigned for valuable consideration, the benefit of all the securities, including the interest in the land, will pass from the assignor to the assignee in equity. The assignment is a contract in the view of the courts of equity, which, being grounded on a consideration of value, these courts will carry into full effect. And if such debt is assigned, by *parol*, by the mortgagee, all the securities for the debt become beneficially vested in the assignee; so that in this manner the *interest in land* may be *consequentially* transferred, and a contract concerning it be effectuated, *without writing*, notwithstanding the first, third, and fourth sections of the statute of frauds, and notwithstanding courts of equity are as much bound by the statute as courts of law.

*It has been observed, that in a court of equity the debt is the principal, and the estate in the land the accessory; but it may be more correctly said, that the transaction is regarded as nothing else, in substance and verity, but a debt to which all the securities are merely accidental adjuncts, and which have no existence but by their union with the subject to which they are attached. Courts of equity proceed with great consistency in the prosecution of this principle, to the full extent of its consequences, as we shall show more at large in a subsequent part of this work. The mortgage, whether in fee or by demise it matters not, is merely a pledge—a specialty debt—a personal thing that devolves to the executors—an equitable chattel—it supports no dower—it is not a revocation of a will—it leaves an equitable inheritance distinct from the legal, in the mortgagor—and, consequently, passes no estate in equitable contemplation. The equity of redemption is, therefore, not a mere trust, but in equity it is the

* [276]
The nature and effect of a mortgage in equitable consideration, accounts for this particularity in respect to mortgage interests in land.

veritable estate, insomuch, that the mortgagee is there considered as a purchaser by the preclosure, and, by consequence, a will made before the preclosure does not pass such subsequent acquisition. In analogy, therefore, to these maxims, and adhering to them still in their construction and application of the statute, these courts have, with obvious propriety, regarded this consequential translation of the interest in the land as out of the prohibition of the statute; for it is not land, *qua* land, which passes, but a pledge, or security, in all respects subservient to a personalty, incapable of existing in separation from it, existing only for the sake of it, and for no other purpose, and so radically removed by the discharge of the debt, as to be considered as never having existed at all.

¶ [277]

By thus directing our attention to the true nature and attributes of a mortgage in the contemplation of those courts, whose appropriate remedies have made it principally the subject of their jurisdiction, we arrive, perhaps, at a more satisfactory *reason for this instance of a translation of an interest in land, without writing, than by arranging it with the examples of the implied trusts expressly excepted by the statute; for the assignment or transfer of the debt is a transaction certainly not within the letter, and perhaps not within the intention of the clause, which provides, "*that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect, as the same would have been if this statute had not been made.*"

Whether a
gift of a
mortgage
can be made
by parol.

But though such appears to be the effect where an assignment of the debt is made for valuable consideration, being a contract to which equity will, without doubt, give effect, yet it is open to much question, whether a mortgage can pass by *mere gift* by parol; for it is said, that the mere gratuitous donation of a chattel (for such is the debt at law, and the whole benefit of the mortgage, with all its securities in equity) can only be made effectual by actual delivery; and then the question occurs, whether the debt or pledge are things susceptible of actual delivery. If a moveable thing is delivered by me to another, and I accompany this act with a declaration of my intention to part absolutely with

the thing delivered in favour of the donee, it seems clear that nothing more is necessary to change the property; though, for want of writing, the effect of such a transaction is open to be modified and governed by parol evidence. Whether the delivery is an act inseparable from the nature of a gift, it is scarcely of any practical importance to inquire, since, though in an abstract view, a man may, perhaps, transfer the property in a moveable thing by a simple parol declaration of his will so to do, yet, without doubt, such declaration treats no contract, and confers no legal right or remedy, but is liable to be revoked by the same breath which gave it existence; and, as against *third persons, the pretended donee would find it difficult, if not impossible, to establish his property, without proof of actual or virtual delivery, or the actual or constructive possession of the thing-itself, which is expressed by the maxim, '*donatio perficitur possessione accipientis.*'

* [278]

A case is reported by Mr. Ambler,^(u) in which the effect of a parol gift of a mortgage came imperfectly under discussion—imperfectly, because other questions were mixed with it, which prevented it from being distinctly considered. Lady Tynte being entitled to a sum of 1000*l.* secured by mortgage upon a real estate, and being old and afflicted with a disorder, of which she died about six weeks afterwards, delivered the deeds and writings, relating to the mortgage and estate, to Hassel, in the presence of several witnesses, one of whom proved, that she made use of the following expression at the time, "I deliver this as my act and deed;" proof was also read of a declaration by Lady Tynte, that after the delivery of the deeds, Lady Tynte said, she hoped that Hassel would be a good girl, for that she had given her a mortgage of 1000*l.* for her own immediate use and benefit. On Lady Tynte's death, a bill was filed by Hassel, among others, to have the benefit of this gift. Several questions were made; first, whether this was a *donatio causa mortis*; secondly, whether it was a *donatio inter vivos*; thirdly, whether, it being a gift of a mortgage upon a real estate, it could take effect, or was not void by the statute of frauds. The Lord Chancellor said, that the question on the statute of frauds and perjuries was of great delicacy and nicety. That very slight evidence of the gift had

(u) Ambler. 318.

* [379]

been given by one of the witnesses ; the other proved the words made use of at the time ; but it was difficult to know what construction to put upon them. The proof of the declarations seemed to clear up her intention. That as to the question, whether it was *donatio mortis causa*, it looked more like a *donatio inter vivos*. That there was such a sort of *donatio mortis causa* mentioned in the "civil law ; but whether it were the one or the other, the question was, whether it was allowable by the statute of frauds. That perhaps it would be more favourable to consider it as a *donatio causa mortis*. That no case had been cited but that of *Richards v. Sims*, which had come on in a very different shape from the present. That what had been argued at the bar, was very true, that the money was the principal, and the land only the security, and that the money would pass by a will not attested according to the statute of frauds. Yet that here was an interest in the land, and it was very considerable, whether it could pass by parol ? His Lordship concluded with saying, that he was very unwilling to give his opinion upon it, and that it was not then necessary ; and that, therefore, at all events, he should reserve the consideration of this question.

It has been attempted a little above, to be shown that it is not inconsistent with the provisions of the statute of frauds, to suppose the interest in the land, arising upon a mortgage, to be transferred in equity, where the debt has been verbally assigned for a valuable consideration ; and, according to the principles of the reasoning on which that opinion was endeavoured to be sustained, the difficulty which the circumstances of the case of *Hassel v. Tynte* present, is not, whether such interest can be consequentially transferred in equity without writing ; but whether such interest can be transferred upon a gratuitous parol donation of the interest in the debt ; for it seemed to the writer of these pages, that, according to the authoritative dicta of judges, and the analogies of their decisions, the interest in the land would, in equity, invariably follow the interest on the debt, for which the land was the mere pledge or security. But as a mere gift must be effectuated or proved by delivery, the question seems simply to be this—Is a mortgage a thing capable of being delivered ? In discussing which question it should be remembered, that a mortgage is composed of two things—the debt and the security. Now the debt is a chose in action, and, as such, incapable of delivery,

being an incorporeal existence ; and the statute seems very plainly and emphatically to preclude any primary or direct transfer of the interest in the land, which, *as has been above endeavoured to be shown, can only pass in equity as consequential to the assignment of the debt ; which assignment takes place in the nature of a contract in equity, where it is supported by a valuable consideration. But the delivery of the mortgage deeds, by way of gift, can only transfer the debt as an accessory, regarding the mortgage as the principal ; but the truth being, that the debt is the principal, and the mortgage of the land the accessory, we cannot suppose the debt to follow the delivery or gift of the mortgage deeds, without reversing the maxim of law and of logic *accessorium sequitur principale*.(111) With these observations, the writer dismisses a question not likely often to occur, and not hitherto settled upon the basis of any decided case.

There is, however, another instance of the practicability of transferring an interest in land by the help of equitable jurisdiction, without writing, notwithstanding the statute of frauds. The instance here meant, is the deposit of deeds by way of creating an equitable lien for the security of money borrowed. This subject has before been considered in a note in the preceding chapter, to which the reader is referred ; since writing which, however, there has fallen in my way, the case *ex parte Coming*,(x) which is in confirmation of the cases cited in that note, with the addition of some useful remarks, which render it very fit to be introduced in this place.

The case came on upon a petition for the petitioner to be admitted as a creditor under a commission of bankruptcy, upon the following transaction, which appeared upon the certificate of the commissioners, and was proved by affidavit. Previously to the bankruptcy, the petitioner agreed to lend the bankrupt 1500*l*. for which purpose he sold out stock of *that value, upon condition

Of the interest transferred in equity by the deposit of deeds, by way of security, for a sum borrowed.

(x) 9 Vez. jun. 115.

(111) But perhaps the delivery of the bond, if one accompanied the mortgage, might be a good delivery to perfect the gift ; for a bond is to many purposes considered as goods ; and see the reasons given by Lord Hardwicke, in *Snelgrove v. Bailey*, 3 Atk. 214, for considering the delivery of a bond as a good *donatio causa mortis*.

that the bankrupt should make a security by way of mortgage to replace the stock within twelve months, and to pay the dividends in the mean time; in pursuance of which agreement, the bankrupt deposited title deeds with his wife, who swore that the deeds always from that time remained in a trunk, of which she kept the key, until they were taken away by the messenger; and the question was, whether there was any proveable debt or actual lien previously to the bankruptcy; upon which the counsel, in support of the petition, contended, first, that this was an equitable mortgage, by the delivery of the deeds by the bankrupt to his wife, as a deposit to secure the money lent by the petitioner; secondly, that as a loan of stock, to be replaced by a certain day subsequent to the bankruptcy, it might be proved, in analogy to the case of a surety. On the other hand, it was insisted, for the assignees, that the circumstances of this case did not amount to an equitable mortgage; and, upon the other point, that this was a mere parol engagement to replace stock at a given day, the value of which must be uncertain. The Lord Chancellor thought, that the real intention of the agreement was to give a bond and a mortgage. First, said his Lordship, if you cannot make any thing of the mortgage, to charge the real estate, it may be contended, upon the effect of the parol agreement, that, though it may be said the land is not charged, the petitioner may insist, that his money is not secured within the terms of the agreement; and the question will then be, whether the terms of the agreement can, under these circumstances, protect the debtor from the *immediate* repayment of the debt. The petitioner may say, that the other put an end to the positive contract, and that the only existing contract is that implied by law upon the loan of the money, which might be recovered in an action. It is also deserving of consideration, whether any previous demand and refusal was necessary; for, if the condition, upon which the money was advanced, is not made good at the time, the lender might say, at law, the condition was refused, as much as if there had been a positive demand, and that, therefore, it was to be considered as money lent in the ordinary way. •

*[282] •But, said his Lordship, beyond that, there is another question deserving much consideration, *i. e.* whether this is to be considered as a deposit? He remembered that, previous to *Russell v.*

Russell,^(y) it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose, and resting altogether upon parol; it being quite competent to the man, who put the deeds into the hands of a creditor, without reference to the debt, afterwards, from favour to that creditor, to say, that they were deposited with him for the purpose of securing his debt, and that so all the perjury which the statute meant to avoid, is introduced. But Lord Thurlow was of opinion, and that is not now to be disturbed, that the fact of the adverse possession of the deeds in the person claiming the lien, was a fact that entitled the court to give an interest. No case has gone the length, said his Lordship, but he did not see the reason, that, if the deposit is in the hands of a person, who could fairly be called a third person, abstracted from both, why such might not be considered as a deposit for the creditor, provided that could be proved to be the intention. But it was very delicate, when the deposit remained in the hands of the mortgagor himself; and he doubted much whether a mere memorandum, kept in his own possession, and not parted with to the man, in whose favour it was expressed, could take it out of the statute. That it was very nearly the same where the deeds were put into the hands of the wife of the mortgagor, to keep them as between her husband and the creditor. That it would not be a safe decision to say, that upon the report, that was a deposit.—The utmost extent to which he could go, would be to direct an inquiry, and that must be by an issue. On a subsequent day the Chancellor said, that under the special circumstances of that case, it would be too dangerous to hold, that the wife of the bankrupt was to be considered a depository of the deeds for the debt of the petitioner, who, therefore, could not support his mortgage. But, with reference to the agreement to replace *the stock, at a particular day, he should be at liberty to prove the amount of his debt.

*[283]

Partitions, which at the common law could be made by joint-tenants by deed only, by tenants in common by livery only, without deed, and by coparceners by parol only, without deed or livery,^(z) are, by virtue of this statute, become incapable of being effected in any case without writing. Joint-tenants and ten-

Partitions—
whether the
statute ex-
tends to
them.

(y) Vid. *supra*.

(z) Litt. sect. 250.

ants in common were not compellable among themselves to make partition, until the 31 H. 8, c. 10, and 32 H. 8, c. 32, gave a remedy for enforcing it ; but parceners were always at common law subject to a coercive partition by the writ *de partitione facienda* ; which some of the books^(a) assign as the reason for the validity of a partition at common law, though made by word of mouth alone. But the reason given by Hawkins, in his Abridgment of Coke Littleton,^(b) seems to be more satisfactory, viz. " that partitions between parceners were much favoured and privileged, because their undivided estate was created and cast on them merely by act of law." Partitions, therefore, between parceners, might at law be made by parol ; and what more particularly marked this favour of the law towards them, rent, estovers, and such like incorporeal things, might, upon such partition, be reserved or granted, for equality of division, without deed or writing, notwithstanding they *lay in grant only*, which was a privilege without a parallel in the law. But then such reservation or grant ought to be out of the lands descended, and not out of other lands, and the rent so reserved or granted was distrainable of common right though it was not a rent service.

*[284] Joint-tenants, by reason of the particular nature of their estate, which is held by them in perfect unity, each being seized in the language of the law, *per mie et per tout*, cannot *enfeoffe*, each other of their respective parts of the land, for each already holds all the land subject to the interest of his *companion, and the conveyance by livery of seisin cannot apply to one who is already in possession ; neither can they *surrender* to each other, even though he be *only tenant for life*, who attempts to make the surrender, and he who attempts to take the surrender, be *tenant in fee simple* of his part. Though it is true, that, if there be two joint-tenants, and one of them have the particular estate, and the other the fee simple, as where the estate is limited to two, and the heirs of one of them, and he that has the estate for life, aliens his part to a stranger, the alienee may surrender to the other joint-tenant : or, if there be three joint-tenants for life, and the fee simple is limited to the heirs of one of them, and one of the joint-tenants for life releases to the other, and he to whom this release is made, surrenders to him who has the

(a) 2 Bl. Comm. 324. (b) 256.

fee simple, this is a good surrender for a third part.(c) The proper medium of mutual translation of each other's parts is a release, the reason of which easily occurs, by adverting to the nature of their estate.(111a) But, on the other hand, as tenants in common have several and distinct freeholds, they may *enfeoff* each other, but cannot *release* to each other, for a release supposes the party to have the thing in demand ;(d) and the estates having come to them by distinct liverys, must pass to each other by distinct liverys. At common law, therefore, one tenant in common might convey to his companion by parol with livery of seisin, but not so a joint-tenant.

*It seems, therefore, to be an inadvertence, in the author of the Commentaries,(e) when he says, that in the case of joint-tenants and tenants in common, the conveyance must have been perfected by livery of seisin ; for which he cites the text of Littleton, sect. 250, and Co. Litt. 169. The words of Lord Coke are, " a partition by joint-tenants is not good without deed, but tenants in common may make partition by parol, and if they execute the same in severalty by livery this is good and sufficient in law ; and, therefore, when the books say that joint-tenants may make partition without deed, it must be intended of tenants in common, and executed by livery." At the present day, however, it is very clear, that the statute has made it necessary, both with respect to tenants in common and coparceners, that a partition of their lands must be effected by writing ; among joint-tenants a deed is necessary, as it stood at the common law.

The method of conveyance by exchange (now seldom adopted but formerly frequently in use) at common law might sometimes be made by mere word of mouth, without deed or livery.(f) If

(c) Vid. Perk. Sect. 586. 587. (d) Co. Litt. 193, 200, b. (e) Vid. 2 Bl. Comm. 324. (f) For an explanation of this conveyance, see Co. Litt. 51, Vin. Exchange (A. 2.)

(111a) But if one joint-tenant grants, bargains, and sells, or gives, grants, and confirms his estate to his companion, either of these may operate in law as a release, vid. 1 Ven. 78. 1 Sid. 452 ; and it may be noted, by the way, that if there be three joint-tenants, and one of them doth release to one of the other two, in such like cases there is no need of any limitation of the estate, for the release is good without it. Touchstone, 324.

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all or part of the hereditaments, whereof the exchange was made, lay in several counties, or if all or part lay in *grant*, and not in livery, although they were situate in the *same* county, in these cases it was necessary that the exchange should be in writing, by deed indented. But where the exchange was of lands, and of lands lying in the same county, although it were of any estate of freehold or inheritance, yet it might be by word of mouth, without writing: and it might also have been by parol, when the hereditaments exchanged lay in different counties, if the exchange was made only for a term of years. Other distinctions, applicable to this question, are to be found in the books; but as it seems quite clear, that the statute of frauds and perjuries *has rendered every exchange necessary to be in writing, whether of freeholds or terms of years, if the interest exceeds three years, it seems unnecessary to add more upon this subject: but the reader may find these distinctions abundantly stated and explained in Perkins's Sections, 244, 247, et. seq. and Coke super Litt. 50, 51, 52. Litt. sect. 62. 1 Roll. 814. 9 Rep. 14; and thus the present Chapter seems properly brought to a conclusion.

CHAPTER V.

Sections 5, 6, 19, 20, 21, 22, 23.

5. And be it further enacted, by the authority aforesaid, that all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect.
6. And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil, in writing, or other writing, declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent. 2. But all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated, by the testator, or by his direction, in manner aforesaid, or unless the same be altered by some other will or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.
19. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury, be it enacted, by the authority aforesaid, that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is *not proved * [288] by the oaths of three witnesses (at the least) that were present at the making thereof. 2. Nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect. 3. Nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwell-

ing, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

20. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said tesmony, or the substance thereof, were committed to writing, within six days after the making of the said will.

21. And be it further enacted, that no letter testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired. 2. Nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

22. And be it further enacted, that no will, in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or charged by any words, or will, by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

* [289] *23. Provided always, that notwithstanding this act, any soldier, being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act.

PART I.

Execution of Wills.

A short account of the progress of the testamentary power.

IT has been before observed, that the authorised and direct means of disposition by will, of immoveable property, was a very late fruit of the growing policy of our ancestors. Land was by slow degrees rendered alienable, *inter vivos*, in gradual subser-

viency to the spreading wants of mankind, assisted by the multiplication of a circulating medium of universal valuation; but alienations to take effect after death, not being influenced by the same causes, would naturally take place at a later stage in the progress of society; not to mention, too, that after the hand that held and maintained the possession was withdrawn, an acquiescence in this posthumous controul, implies a conception of the sacredness of property, and a state of order and security, not very common in the beginnings of nations. (112) Accordingly, it appears doubtful whether, among the Romans, before the introduction of the laws of the Twelve Tables, or among the Athenians before the legislation of Solon, the direct testamentary disposition even of moveables was established; and we are *told by Tacitus, of the Germans, at the time of his writing concerning them, that the children succeeded to the possessions of the parent, and that he had no power to alienate them by his will. If he had no children, the next steps in the order of inheritance and succession were the *patres patrui avunculi*. (113)

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(112) Omnino rationi naturali repugnat, alicui jus esse statuendi de rebus suis ita, ut voluntas post mortem valere incipiat; ubi jam velle desiit et mors omnia solvit. Hert. Elem. Polit. pars 2, sect. 11, § 53. Vid. Vinn. Comm. tit. de test. ordin.

(113) Tacit. de Mor. Germ. c. 20.—The succession to the heirs of the body, and in case of the defect of such representatives, to the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind. The suggestions of a common feeling appear, therefore, to have made this an universal rule of transmission, and to have established it in communities widely separated by time and space. Thus the representation in the channel of blood and proximity seems to have its foundation higher than any positive institutions, though to positive institutions we must of course refer the *modifications* of this rule of succession; which, indeed, has been so variously ordered, that no two nations exactly resemble each other in their institutions regarding it. That the right of controuling this succession by the private will of the possessor, was the product of an improved period of legislation, there is much concurrent testimony to show. Till the legislation of Solon, the Athenians did not possess this privilege, as it appears from many authorities, particularly from Plutarch, in his life of Solon, page 196, edit. Bryan, and the orations of Iszus, especially *de Philoctemonis Heredi-*

Progress of
the *testamenti factio* in
the Roman
jurisprudence.

*If the power of disposing of land by will was exercised by our
 † [292] Anglo-Saxon ancestors, it seems much less likely that it originated with themselves, than that they adopted it from those laws

tate; nor, according to Selden, *de Success. de bon. Hebr.* c. 24, did it exist among the ancient Jews; nor, as we learn from Tacitus, *de Mor. Germ.* c. 20, among the Germans in his day; and the tenderness which continued to prevail among the Romans for the legal heir, is strongly displayed in their provisions by the laws *Furia*, *Voconia*, and *Falcidia*, and more pointedly, perhaps, by their remedy of *querela inofficiosi testamenti*, wherever a will was made against the order of natural affection, without reasonable cause. With respect to the question how far the right of disposition by will existed among the Romans, before the laws of the Twelve Tables, there seems to be much variety of opinion. The text of Justinian propounds the order in which the form of the *testamenti factio* proceeded, which the student will consult, with pleasure, in the Commentary of Vinnius, edited with notes, by Heineccius, in the title *de Testamentis Ordinandis*. It appears, that the most ancient mode of making a testament, among the Romans, was, by converting a man's private will into a public law, for such seems to have been the object and intention of the promulgation or celebration of a testament in the *calatis comitiis*, i. e. in the presence of the Roman people summoned before the Sacerdotal College *per curias*. And, according to Heineccius, these assemblies were not convened specially for the purpose of giving sanction to wills, *sed legum ferendarum magistratuumque creandorum causa immo et ob alia negotia publica, bellum, pacem, judicia, &c.*

Thus was this private disposition by testament of the property of an individual promulgated and ratified in the same manner as a public law; and for this reason, i. e. *ex causa efficienti*, the *testamenti factio* has been denominated in the text of the imperial law *non privati sed publici juris*, *D.* 28, c. 3, and again by Ulpian, it is said, *legatum est, quod legis modo —testamento relinquitur*, *Ulp. tit.* 24, § 1. Another form of testament which existed antecedently to the laws of the Twelve Tables, was that called *testamentum procinctum* or *in procinctu*, which was the privilege only of those who were on the eve of going to battle, or girt for the war, with the uncertainty on their minds of their ever returning, and was among the immunities in regard to property conferred by the Romans upon the defenders of their country. But as the *comitia* were held but twice a year, so that a man might be surprised without having the opportunity of thus solemnizing his last will, and the attendance upon these public assemblies was often difficult or impossible to the sick, and furthermore, as women were by these forms precluded from making any testament, as not having any communion with these *comitia*, according to Gellius, lib. 5, c. 19, a third method was struck out, which might facilitate the accomplishment of this ultimate disposal of private property

which the Roman government had established and *left standing in this country. It appears, however, pretty certain, that this testamentary power over land did not survive the Norman conquest,

to all descriptions of persons, otherwise competent; and this last method was called the *testamentum per as et libram*, which was a fictitious purchase of the family inheritance or heirship, by money weighed in a balance, and tendered by the intended inheritor to the testator, before witnesses. Thus it is said to be *imago vetusti moris in venditione atque alienatione rerum Mancipi, quæ, uno verbo, Mancipatio dicitur, nimirum ut is in quem hæ res transferebantur, eas emeret domino ære et libra, appenso ei (nomoucharin) nummouno*. And it seems that this fictitious proceeding was still retained after the promulgation of the law of the Twelve Tables had authorised the making of wills by the clause of *paterfam. uti legassit, &c. ita jus esto*; for it was still regarded as necessary to raise the will of a private man to a level with the laws of the state, that it should take the shape of a strict legal transaction *inter vivos*, for *testandi de pecunia sua legibus certis facultas est permessa, non autem juris dictionis mutare formam, vel juri publico derogare cuiquam permisum est. C. 6, 23, 13*. The two former methods, by the *testamentum in procinctu*, and *calatis comitiis*, were thrown into total disuse by the *testamentum per as et libram*; but this last form of willing again made way for others of a more convenient description. The methods above-mentioned were referrible to the *jus civile*, or, as we express it, the law of the land, but from the edict of the prætor, other forms at length were brought into practice, by virtue of which *jus honorarium* the *Mancipatio*, and the weighing and delivering of money, were dispensed with, and, in their stead, the solemnity of *signing* by seven witnesses was introduced, the *presence* only, and not the *signature* of witnesses being necessary by the *jus civile*.

At length, however, by gradual use and progressive alterations, as the text of Justinian informs us, the *lex prætoris* and the *jus civile* were in some degree incorporated, and a compounded regulation took place, whereby it became requisite to the valid constitution of a will, that the witnesses should be present (the presence of witnesses being the rule of the *jus civile*); that they and also the testator should sign, according to the superadded institution of positive law; and lastly, that in virtue of the prætorian edict, their seals should be affixed, and that the number of witnesses should be seven. Afterwards, the further solemnity of naming the heir in the testament was added by Justinian, and again abrogated by the same emperor, in Nov. 119, c. 9, and, at length, the excess of testimony was corrected by the canon law in the pontificate of Alexander the Third, by which it was declared sufficient to prove a

except in particular cities and boroughs, where, by particular favour, the Saxon institutions were suffered to breathe : (114) it ceased by the operation of the feudal system of property, which necessarily excluded all voluntary alienations of possessions, with which personal services and duties were inseparably connected. (a) But with respect to moveables, the testamentary power seems, in this country, with more or less partial restraint, to have been exerciseable in a very remote period. The ready mode of authenticating *the property by the possession, and transferring the possession by the manual delivery of goods, and the usufructuary and revocable quality of terms of years, disposed our ancestors to consider them as floating acquisitions, and a proper subject for every kind of alienation. But though testaments of moveables were permitted by the ancient law in England, according to Glanville and Bracton, yet it extended only to one-third, called the dead man's part ; which limitation seemed to prevail in Lon-

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(a) Vid. 1 Eq. Ca. Abr. 40L

testament by two or three witnesses, the parochial minister being added ; *improbata constitutione juris civilis de septem testibus adhibendis ut nimis longe recedente ab eo quod scriptum est—in ore duorum vel trium testium etet omne verbum*, Swinb. 64. Deut. c. 18. Matth. c. 18, which reformation has received the sanction of universal usage.

Swinburn says, that this institution has also been reformed by the general custom of this realm, " which distinctly requires no more than two witnesses, so they be free from any just cause of exception ;" which observation he repeats in several places of his treatise on wills, on the authority of Linwood, in *Stat. Verb. Prob. de Test. l. 3. Provincial Constit. Cana*. Bracton also has the following passage : "*Fieri autem debet testamentum liberi hominis ad minus coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis ad hoc specialiter convocatis, ad probandum testamentum defuncti, si opus fuerit, si de testamento dubitatur.*" Bract. lib. 32, fol. 61 ; but these words import a recommendation, and not an imperative rule ; and nothing seems now to be better understood, than that a will of personalty needs neither the attestation of witnesses, or the testator's seal or signature ; and though written in another hand, yet if proved to have been written according to the testator's instructions, and approved by him, it is a good will to dispose of chattels. Comyns, 452, et seq.

(114) Whether gavelkind lands in Kent were devisable by custom, seems to be a matter in dispute. See the arguments *pro et con.* in Rob. Gavel. 235.

don and York, after it had fallen into desuetude in other parts of the kingdom, till, by the 11 G. 1, c. 18, sect. 17, 18, the power of devising was thrown generally open.⁽¹¹⁵⁾ According to the opinion of the author of the Commentaries, "by the ancient common law of the land, and which continued at the time of Magna Charta, a man's goods were to be divided into three parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might dispose of one moiety, and the other went to his children. If he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without wife, or issue, the whole was at his own disposal; the shares of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum*, was given to recover it. In the reign of Edward the Third, this right of the wife and children was still held to be the universal and common law, though frequently pleaded as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly to be the general law of the land, in the reign of Charles the First. But the law has since been altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels, though it cannot be traced out when first this alteration began.^(b)

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(b) 2 BL Com. 491, 2.

(115) By the 4th W. & M. c. 2, persons within the province of York may dispose by will of all their personal estate, in as large and ample a manner as within the province of Canterbury, and elsewhere; and the widows and children, and other kindred of such testator, are barred of their claims under the custom. But the citizens of the cities of York and Chester, who were freemen, inhabiting there, being excepted out of this statute, the 2d and 3d Anne, c. 5, was made to repeal this exception, and to put them upon the same footing, in this respect, as persons within the province of York. And by the 11th G. 1, c. 18, the citizens and freemen of the city of London are also enabled to devise and dispose of their personal estate, in such manner as they shall think fit, except where they enter into any agreement on marriage, or otherwise, that their personal property shall be subject to or distributed by the custom, and in cases of intestacy, in which case the property becomes subject to, and distributable according to the custom.

Restraints upon the testamentary power by the customs of York and London.

With respect to land, the genius of the feudal system was long in giving way to the increasing propensity of individuals to make provisions that were to reach beyond the grave. It seems, however, that with the consent of the superior, the feudatory often contrived to alienate by a donation by deed, made on the bed of death, *mortis causa*, (116) which, being a *gift to take effect in

Of the power of bequeathing legacies in the different stages of the Roman law.

(116) This difference in estimation and importance between land and goods was a genuine offspring of the feudal system. According to the law of Rome, no such difference subsisted. The general representative was the heir, and by that title he succeeded as well to the moveables as immoveables. And when the whole substance devolved, the difference was only between him who was appointed heir by the will, and was called the *herus institutus*, and him who succeeded to the intestate as his natural heir. It has been endeavoured, in a preceding note, to give some help to the student towards his understanding of the nature of this appointment of an heir, by will, in the law of Rome, before and after that the law of the Twelve Tables, by the clause '*uti quisque legasset*,' &c. (which was construed to comprise the *heredum institutiones*, as well as the *legata*) confirmed the general testamentary power. A slight summary of the practice and forms of bestowing particular parts of a man's possessions by way of legacy, under the different stages of the Roman law, may, perhaps, be not unacceptable to the reader.

The *legata et fidei-commissa* were the two modes whereby the property in particular things, as distinguished from the universal inheritance or substance of the testator, in the disposal whereof, and in the institution or appointment of the universal heir, consisted properly the *testamenti-factio*. Another very important distinction between the *hereditas ex testamento* and the *legatum* was, that the latter was purely lucrative, whereas the former was often burthened with obligations, and sometimes to such an extent as to be thereby rendered unprofitable. By the text of the imperial law, the legacy or *legatum* was defined to be "*donatio quedam a defuncto relicta, ab herede prestanda*," and great stress was laid by the commentators on the word '*quedam*,' as importing something having the quality of a gift in some respects, and yet essentially differing from it in others. A gift they said it could not be, because a gift was properly a transaction between two persons, and requiring for its perfection the acceptance of the donee. A legacy depended not upon the acceptance of the legatee, nor was it a transaction between two persons; it was the creature of the testator's will only, ambulatory and suspended during his life. In a strict sense, indeed, it was considered as expecting the acceptance or assumption of the inheritance by the heir, with the function belonging to it; *post mortem testatoris adhuc pendet ab aditione hereditatis*. And yet it was *quedam donatio*, as pro-

point of form, *de presenti*, though its substantial operation was postponed to the death of the *grantor, might introduce this ambiguous kind of *testamenti-factio*, with less apparent novelty of

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ceeding from the benevolence of the testator, and conferring a title of emolument only—*titulus, mere lucrativus*. The latter words of the definition '*ab herede prestanda*,' are to be understood as implying, that, although the *property* in the thing bequeathed passes directly to the legatee, the *possession* was nevertheless to be looked for at the hands of the heir.

We learn from Justinian, *Inst. tit. de legatis*, what were the ancient methods and forms of bequeathing, which, by their strictness and technicality imposed great difficulties upon, and sometimes disappointed the wishes of the testator. These various forms imparted a diversity of rights and remedies to the legatary, and were of unequal efficacy in respect to the disposing power of the testator : as for example, by one form a testator could dispose only of what was already his own property ; by another, he could dispose of the possessions of other men, provided they were saleable, as far as his assets in the hands of the heir would suffice for the purchase ; some gave a right of action in *rem*, and some in *personam*. These, and other particulars respecting them, the reader will find well explained in the Commentary of Vinnius, *tit. de legatis*. The inquiry is, however, only a matter of curiosity, as Justinian, by a sensible law, reduced these various forms to one and the same operation. But as still the general strictness which characterised them all remained, though the special intricacy of distinction between them was removed, the same Emperor, by a stroke of liberal policy, levelled the distinction in point of *effect*, between the *legata* and the *fidei-commissa*, and thereby, the rigid forms of expression, the necessity of the previous appointment of an heir, the testator's inability to extend the benefit beyond the life of the heir, or to bequeath it by an instrument less solemn than a regular testament, or codicil confirmed by a testament, were all removed, and the same indulgence given to the bequest by way of *direct legacy*, as to that which was effected through the medium of a *trust*. In virtue of this ordinance, and in prosecution of its spirit, a more benign interpretation obtained in the construction of testaments, in which, from thenceforward the intention of the testator was the leading object of inquiry, and a numerous description of persons whom the rigour of the *jus civilis* had deemed incapable of taking by way of *legacy*, such as the banished, the childless, persons living in celibacy, and strangers, were brought within the legitimate path of a testator's benevolence, and the circuitry and precariousness of a trust were avoided ; and, on the other hand, as the equation of the advantages respectively belonging to the *legata* and the *fidei-commissa*, was mutual, instead of the extraordinary, and sometimes dilatory process by which the *fidei-commissa* were enforced, the ordinary remedy by the

principle.(c) It seems, "indeed, that the consent of the heir was, at first, and for a long continuance, thought necessary to these alienations by deed, in prospect of death ; though, according to

(c) Glanv. lib. 7, c. 1.

Of the *donatio causa mortis*.

actio ex testamento, and even the *rei vindicatio*, in the cases where it applied, were opened to all descriptions of legataries.

The *donatio causa mortis* is a title of the civil law, and of our own, to which the attention of the diligent student should be directed. The inquirer, however, will have to encounter some diversity of doctrine on this subject, both in the judgments of courts, and the opinions of commentators. In the text of the Institutes of Justinian, lib. 7, it is thus defined, or rather described : *Mortis causa donatio est, quæ propter mortis fit suspicionem : quum quis ita donat, ut si quid humanitas ei contigeret, haberet is, qui accipit : sin autem super vixisset is qui donavit, reciperet : vel si eam donationis penitusset, aut prior decesserit is, cui donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia. Nam cum precedentibus ambiguum fuerat, utrum donationes, an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumerentur, et sic procedat, quem ad modum nostra constitutio eam formavit. Et in summa mortis causa donatio est, quum magis se quis velit habere, quam eum, cui donat, magisque eum cui donat, quam heredem suum :* which description the Emperor illustrates by an example from the Odyssey, of the gift of Telemachus to Pircus (see also other examples of the antiquity of this species of gift, in Taylor's Elements of the Civil Law, p. 536-7.) According to Vinnius, in his Commentaries on this description of the *donatio causa mortis*, it is not necessary to the constitution thereof, that the giver should be in actual and imminent danger of death, but it is enough if he is moved by the general consideration of mortality, *sola cogitatione mortalitatis ex sorte humana*, provided he expressly declares at the time, that he gives with such expectation and intention, otherwise the gift will be construed a pure and simple *donatio inter vivos*, and, consequently, will not be revocable. The same account of it is given by Swinburn, in the seventh section of his Treatise on Testaments and Wills. But in our courts of equity, the description of this species of donation has been compressed within narrower bounds, being limited to those cases where a man lying in extremity, or being surprised with sickness, and having no opportunity to make his will, lest he should die before he can make it, gives with his own hands, his goods to his friends about him ; "this," says Lord Cowper, "if he dies, shall operate as a legacy, but if he recovers, then the property thereof reverts to him." See Gilb. Eq. Rep. 12, 13. Prec. in Chan. 269 ; and see 3 P. Wms. 358. 1 P. Wms. 405, 442. 1 Vez. jun. 547. The reader, however, will find in Still v. Chapman, 2 Bro. C. R. 612, a decision of Lord Thurlow on this subject, conformable to the explanation given in Vinnius and Swinburn, as above mentioned.

some writers, this practice was worn out before the statutes of
 *Henry the Eighth.(d) It appears, that soon after the statute of * [300]
quia emptores, by removing the restraint upon alienations, †had † [301]

(d) See Dal. on Feuds, c. 3, sect. 1, and Spellman's Remains; also Glanv. l. 7, c. 1.

It appears quite clear, according to all the authorities, that there must be a delivery of the thing by the giver in his life-time; and we observe, that Lord Cowper's expression, in the case of *Hedges v. Hedges*, 3 Prec. in Chan. 269, was, "gives with his own hands." And, by Lord Hardwicke, in the case of *Shargold v. Shargold*, 2 Vez. 431, it was said, that a delivery must be *actual*, and that a *symbolical* delivery would not do; for which reason his Lordship held, that a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in contemplation of death, was not a good *donatio mortis causa*; consequently, said his Lordship, this was merely legatory, and amounted to a nuncupative will, and was contrary to the statute of frauds; for if the necessity for delivery be taken from the thing, it remained merely nuncupative. Upon the same ground, his Lordship held that it was impossible to make a donation *mortis causa*, of stock or annuities, because in their nature they were not capable of *actual* delivery, and that, therefore, there could not be a gift *causa mortis* of them, without a *transfer*, or something amounting to that. And upon the same principle it was judged, in *Miller v. Miller*, 3 P. Wms. 356, that a note for 100*l.* being merely a chose in action, could not be the subject of a *donatio causa mortis*.

But still, perhaps, if such a delivery be made as, in gifts *inter vivos*, would actually transfer the property in the thing, and in law transmute the possession, and such delivery is at the same time the best and most effectual delivery that can be made of the actual thing, this will be a sufficient delivery to support the act as a *donatio mortis causa*; for the nature of the thing must be respected in all transfers. Thus, in the case above cited, of the gift of the receipts for S. S. Ann. it seemed to be admitted by the Chancellor, that the *transfer* of the stock itself would have been effectual. And, perhaps, Lord Hardwicke designed, in the case above cited, to deny the efficacy of a *symbolical* delivery only where the thing was susceptible of a *specific* and *manual* delivery. The decision of *Lawson v. Lawson*, 1 P. Wms. 441, wherein a man upon his death-bed had drawn a bill upon a goldsmith, to pay 100*l.* to A's wife to buy mourning, is an instance of an effectual appointment in the nature of a *donatio mortis causa*; and see *Tate v. Hilbert*, 2 Vez. 111, wherein that decision was approved by Lord Loughborough, his Lordship, at the same time observing, that the report in 2 P. Wms. was incorrect, as it appeared from the Register's book that the direction for mourning was indurced upon the bill, in the donor's hand-writing. It

concurred with other causes in diffusing bolder conceptions of the free and ultimate disposability of property in land as well as moveables, the obstacle which the necessity of livery of seisin still opposed to the wishes of the nation, was eluded by the practice of making feoffments to uses, over which, by the assistance of the courts of equity, wherein declarations and dispositions in respect to these uses were carried into effect if made upon good conside-

will be seen also by the cases of *Still v. Chapman*, 2 Bro. C. R. 612, and *Snellgrove v. Bailey*, 3 Atk. 214, that both bank notes and even bonds have been held to be susceptible of a sufficient delivery to constitute a valid *donatio causa mortis*.

The principal features which distinguish the *donatio mortis causa* from the *proper legacy*, should be adverted to, before a just idea of this peculiar kind of gift can be acquired. The points also of resemblance should be attentively marked. And principally, on this head, the ambulatory, imperfect, and revocable nature of both will occur as the most important article of their similitude; and on the other hand, the leading circumstance of difference between them, will seem to be the independence of the title of the donee of the gift *causa mortis*, on the act or consent of the representative. The same grounds of difference distinguished them in the civil law, *donatio hec aditione hereditatis, sicut legatum non pendet, sed sola morte confirmatur donantis*. It should be observed also, that a *donatio causa mortis* recedes from a legacy in its exemption from the jurisdiction of the ecclesiastical courts, 2 Vez. 437; and again approaches it by its liability to debts upon a deficiency of assets; see *Smith v. Cason*, at the end of *Drury v. Smith*, 1 P. Wms. 406. It is liable to the duties on legacies, imposed by the late acts of parliament; and with the Romans it fell under the restraints of the *lex Falcidia* as well as legacies. They are both liable, according to our laws, to be defeated by creditors.

To conclude this too long note, it may be finally observed, that the fact of the gift *mortis causa* is, in our law, to be proved in the same manner as other facts are to be proved; whereas, in the law of the empire, it was a point of resemblance between this gift and the legacy, that the former was necessary to be proved by five witnesses, which was the number necessary to the proof of a codicil, or any instrument of a testamentary operation which was not in strictness a testament according to its definition in the civil law.

If the gift be made and authenticated by a written instrument, without any actual delivery, but the deed or instrument conveys an interest to take effect absolutely in possession at the decease of the donor, this cannot be effectuated as a *donatio causa mortis*, but there seems to be no reason why it should not operate as a testamentary disposition.

ration, a complete testamentary power was obliquely exercised. And if these creations of uses were adopted from the civil law, we may conjecture that our ancestors were led more easily into the practice, by the notions they had previously learned to entertain of a distinction between the legal and beneficial property, from their reservations of the *dominium directum*, *abstracted • [302] from the *dominium utile*, in their first feudal donations.

It is well known, however, that by the statute 27 H. 8, c. 10, this method of virtually disposing of land by will was disturbed. For by that statute, the use, as soon as it was created, became the *legal* estate, which was immediately carried to and executed in the *cestui que use*, so that wills lost their operation on the use raised directly upon a feoffment. It was still, however, in the power of individuals to elude the statute, and to keep the legal separate from the beneficial interest, by means of a use raised upon a use, or a second use, which the courts construed to be out of the reach and operation of the act, and thus saved a whole province to the jurisdiction of equity, under the peculiar denomination of trusts. In a very few years afterwards, however, an end was in a great measure put to these artifices, by the statutes of 32 H. 8, c. 1, and 34 H. 8, c. 5, usually called the statutes of wills, and passed in compliance with the national propensity, which was turned so strongly towards the testamentary power over lands, that it was become as difficult as it was impolitic to withhold the allowance of the legislature. By which statutes, all persons having any manors, lands, tenements, or hereditaments, in possession, reversion, or remainder, holden by soccage tenure, or in the nature of soccage tenure, and having no lands held *in capite*, or by knight's service, were enabled to devise all their lands, or any rents, commons, or profits, out of them, to any person in fee simple, fee tail, for life, or for years, at their pleasure. Those holding of the king *in capite* by knight's service, or by knight's service and not in chief, or by any common person by knight's service, might devise two parts thereof in three, and no more ; the other third part being to descend to the heir, for satisfying the duties of the tenure, and, therefore, the devise of the whole land in such a case would be void. The person holding any such land by knight's service *in capite*, and other lands held by soccage tenure, might devise *two parts of the whole, • [303]

and no more, or any rent, &c. out of it, at his pleasure. He that held lands of the king by knight's service only, and not *in capite*, as if a mesne lord by knight's service, had also other lands held by soccage tenure, might devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his soccage lands at pleasure. But which disposing power was only to be exercised by a will or testament committed to *writing*, in the *life-time* of the testator.

By the conversion of military tenures into common soccage, the statute 12 Car. 2, brought the greatest portion of the lands of this kingdom within the expansion of the above mentioned statutes of Hen. 8, and under subjection to the last wills of such as possessed them in fee simple. By this statute, 12 Car. 2, c. 24, which, as the title imports, was "for taking away the court of wards and liveries, and tenures *in capite*, and by knight's service, and purveyance, and for settling a revenue upon his majesty in lieu thereof." All tenures by knight's service of the king, or of any other person, and by knight's service *in capite*, and by soccage *in capite* of the king, and the fruits and consequences thereof, are taken away and converted into free and common soccage: and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any state of inheritance, at the common law, shall be in free and common soccage, and not by knight's service, or *in capite*. But the tenure by copy of court roll, and the services incident to the same, are untouched by this act, nor do the statutes of Hen. 8, above mentioned, extend to them, as they do not come within the description of soccage tenure. The tenure in frankalmoign, and the honorary services of grand serjeants, other than of wardship, marriage, and the charges incident to the tenure by knight's service, were not removed by the said act of Charles the Second. The eulogy of Mr. Justice Blackstone upon this statute is consonant to the spirit of temperate liberty, which breathes throughout his admirable Commentaries, "a greater acquisition (it is said to be by that elegant and solid writer) to the civil property of this kingdom, than even Magna Charta itself, since that only pruned the luxuriances which had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King

Charles extirpated the whole, and demolished both root and branches."^(c)

It appears, however, that there was something to regret in the almost boundless facility which was given to the testamentary power, by the operation of these beneficial statutes ; insomuch that the writer of the passage just above cited has remarked, in speaking of the operation of the statute of wills, that experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law, which are so nicely constructed, and so artificially connected together, that the least breach in any one of them, disordered, for a time, the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance ; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person, were allowed to be good wills within the statute.

The loose construction of the statutes of wills.

It appears by the cases upon this statute, that the testament of lands and tenements ought not only to be in writing, but that it must be committed to writing at the time of the making thereof, or at least in the life-time of the testator ; and that it is not sufficient to put it into writing, after the testator's death: But if the will be made by parol, and is afterwards written, and then carried to the testator for his approbation, and he approves of it, it is a good will of lands, under the statutes of Henry the Eighth ; and it has been held, that if the testator, when he declared his will by *word of mouth, had ordered the same to be written, and the will was accordingly written in his life-time, the testament was as good as if it had been written at first. But, if a man were on his death-bed, and another came to him, and asked him whether his wife should have his land, to which he answered, yes, and a clerk being present did put this into writing, without any precedent command, or subsequent allowance of the sick person, this was not a good testament of land, according to the exigency of the statute of wills ; and if a man declared his will before witnesses, and sent for a notary to write it, and died before he came, and then it was written, this was no good will of lands, though it would have been sufficient as a nuncupative will of chattels. But if a notary took direction from a sick person for his will, and afterwards went away and wrote it, and then brought it again, and

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read it to the testator, who approved of it ; or if it were written from his mouth by the notary, by the direction of the testator himself, although it were not shown or read to him afterwards, these were held to be valid dispositions of land, under the statutes of Henry 8. And farther, it has been held upon these statutes, that if a notary did only take rude notes or directions from the sick man, which he did agree to, and they were afterwards written fair in his life-time, and not shown to him again, or not written fair till after his death, this was an effectual will to dispose of lands.(f)

In the case of *Laurence v. Kete* (g) we have the sentiments of the judges pretty much at large, respecting the sufficiency of a will under these statutes. A being sick, said that he had devised all his lands to his wife for life, and limited several remainders of several parcels of them, and about an hour afterwards expressed a wish that one K were there to write his will, whereupon the wife, without acquainting her husband with it, sent for K, who, from the mouth of the witnesses who heard the devise, wrote the same ; but because they differed in their testimony, touching the limitations of the *remainders, he wrote two wills, and this without the privity of the husband, who, before the writing was finished, became senseless, and presently afterwards died. And thereupon the following points were agreed to by the court, and given in charge to the jury : 1st. That an actual devise by word, is no sufficient ground for a stranger to write the will, but there ought to be an actual desire expressed to have the will written, nor is a bare wishing sufficient ; there should be an actual willing. 2. That this desire ought to be expressed in some short space of time after the devise, so that it may be regarded as one continual act ; for if the devise be made at one time, and at another time the devisor sends for a person to write his will, a new declaration will be necessary to make it effectual. 3. That an actual desire of the husband that K were there to write his will, was a sufficient ground for the wife to send for him, though the devisor gave no express directions to do it. 4. That the writing the will from the mouth of witnesses was sufficient, and it need not be from the mouth of the testator. 5. If witnesses agree as to the devise for life, the will stands good for that, though they

(f) Perk. sect. 476, 477. Dyer, 53, 72. Plowd. 345. 4 Rep. 60.

(g) *Albeyn Rep.* 54.

disagree as to the limitation of the remainders. 6. Though the deviser becomes senseless before the will be written, yet, if it be written before he dies, it is a good will in writing. 7. If a will continue in writing at the time of the death of the testator, though it be lost or burned afterwards, it stands good ; but if it be burned at the time of his death, then the devise is void. The next day the jury gave a verdict against the will, because the evidence was not clear as to the testator's desire to send for K. There was a motion for a new trial, upon pretence of partiality in some of the jurors, but the motion did not succeed.

It seemed proper to lay before the reader these *dicta* and determinations of the judges and the courts, to acquaint him with the great danger of fraud and perjury that existed under and in consequence of the statutes of H. 8, and which came to be more diffusely felt after the statute of the second Charles had extended the power of devising to the far greater part of the lands in this country ; and by examples of the law, as *it then stood, to qualify him the better to judge of the propriety and expediency of the provisions in respect to wills, contained in the great statute which is the subject of these sheets.

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The case of *Stephens v. Gerrard*,^(A) has been said to have given rise to the clause respecting the signature and attestation of wills in the statute of frauds. Some loose sheets of paper were there produced as the will of Sir Edward Worsley, and a title was set up under them in favour of his natural daughter ; they were written by one Baynham, an attorney of Grey's Inn. Sir Edward had not signed them, and there was no evidence offered to prove them published, but that of Baynham ; whose evidence, according to Siderfin, made it appear, that Sir Edward had dictated a writing made by him, and had caused it to be interlined, and had said that he intended to write it over again himself, but that, in the mean time, what was written should be his will, though he refused at that time to sign and publish it as such ; and the conclusion of it as it stood was as follows : " In witness whereof I have put my hand and seal to every sheet ;" but, in fact, his hand and seal were not put to any one sheet ; the court, nevertheless, held this to be a sufficient will, and so the jury found it.

These loose constructions of the statute of wills, afforded such facilities to designing persons of practising upon the weakness

These loose constructions of the

(A) Sid. 315. 2 Keb. 128.

statute of wills called for the formal restraints imposed by the 5th and 6th sections of the statute of frauds.

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It was an advantage of the written will that the contents might be concealed from the witnesses.

of men on the bed of sickness, or of forging testaments and supporting them by perjury, when the lips of the party were closed forever, invited the legislature to interpose some additional guards for the protection of these last and most interesting dispositions of property. By the statute of 29 Car. 2, c. 3, it was, therefore, enacted, that all devises and bequests of any land or tenements, devisable either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or *any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect.

It is considered by Swinburn among the advantages of a *written* testament, that the testator has thereby an opportunity of concealing the contents from the witnesses, which he cannot do when he makes a *nuncupative* testament. For, says he, (after enumerating many of the motives which may rationally influence the testator to keep those in expectancy ignorant of his last dispositions) in these and the like cases, after the testator has written his will with his own hand, or procured some other to write the same, he may close up the writing without making the witnesses privy to the contents thereof; and showing the same to the witnesses, he may say unto them, *this is my last will and testament*, or, *herein is contained my last will*, and this is sufficient. Nor, continues he, is the instrument the less available, because the witnesses do not know what is contained in the same, in case the witnesses be able to prove the identity of the writing; that is to say, that the will produced, is the very same writing which the testator in his life-time affirmed before them, to be his will: otherwise, the will can have no effect through defect of sufficient proof. The same writer, therefore, recommends, lest the will should perish for want of sufficient proof, when the testator would not have the contents known, that the witnesses should write their names on the back, or on some part of the testament, or use some other means that might enable them to depose and testify undoubtingly, that the same is the very writing itself, which the testator affirmed to be his will.(i)

(i) Swinb. on Test. part 1, sect. 11, God. O. L. 66.

*What Swinburn here recommends in practice, became soon afterwards the law of the land,¹ by the wise enactments of the statute of 29 Car. 2, which, while it gave to the declaration of a man's last will the solemn notoriety of a triple attestation, preserved to testators all the advantages of the written form; for though, by the statute of Charles, the three witnesses must sign in the presence of the testator, it is no more necessary for them than for the witnesses voluntarily called in by a testator to qualify themselves to prove the identity of the instrument in writing under the statute of Henry the Eighth, to be privy to the contents of the instrument.

This advantage exists equally under the statute of Charles.

In *Peate v. Ougley*,⁽¹⁾ which was after the statute of Charles, a testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or express what it was: but it was all written with the testator's own hand. It was objected, that, this was not a good execution of the will within the statute; for that it was not enough that the witnesses wrote their names, they ought to attest the signing by the testator, or at least the publication of the will; but that the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other side it was insisted, that the execution was sufficient within the statute; for that there was no necessity for the witnesses to see the testator write his name; and, if he wrote these words, *signed, sealed, and published* as his will, and desired the witnesses to subscribe their names to that, it was a sufficient publication of his will, though the witnesses did not hear him *declare it to be his will*. And Trevor, J. inclined, that there was sufficient evidence of the execution.

But the case of *Trimmer v. Jackson*⁽¹⁾ went further, for there the witnesses were so far removed from a knowledge of the **contents*, that they were actually deceived as to the *nature and purpose* of the instrument, which they were led to believe, from the words used by the testator at the time of the execution, was a deed and not a will. It was delivered as his act and deed; and the words 'sealed and delivered' were put above the place where

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(1) Com. 197. (1) Cited by Denison, J. in *Wallis v. Wallis*, 4 Burn. Eccl. L. 127.

the witnesses were to subscribe their names ; and in consideration, as it is said, of the inconvenience that was possible to arise in families from its being known that a person had made his will, it was adjudged by the court, that this was a sufficient execution.

According to these cases, it not only appears to have been the opinion of the courts, that it was unnecessary that the witnesses should be privy to the contents of the will since the statute of Charles, (as it certainly appears to have been held upon the statute of Henry the Eighth) but they seem to have carried the allowance beyond the latitude of the cases, loose as they appear to have been, which were determined upon the statute of wills ; for, as we learn from Swinburn, the authorities go no further than to show, that one of the advantages of the written testament over the nuncupative method, (which was still permitted, where, by the customs of particular places, lands were devisable) was the opportunity it gave to the testator to make an effectual will, without disclosing the contents even to the witnesses, which was a concealment oftentimes of importance to the peace of families ; but then, the identity of the will ought to be proved : and, therefore, it seems to have been a common idea with the writers upon the subject of wills previous to the statute 29 Car. 2, that the nature of the instrument or writing ought to be announced or published by the testator to the parties present. A reliance upon the security derived from the attestation by three credible witnesses, in the presence of the testator, may account for the little importance attributed by some of the judges to the publication of the will by the testator ; so little, indeed, as to deem it unnecessary for him to announce or declare to the witnesses the nature of the instrument they were to sign ; but it was scarcely to have been

* [311] *expected, that the chief justice, who, in *Bond v. Seawell* (m) held it unnecessary the testator should declare the instrument ‘ *to be his will,*’ should at the same time have had so little reliance in general upon the clause of the statute, requiring the attestation of three witnesses, as a security against fraud, and so low an esteem in particular for the value and force of the word ‘ *credible,*’ as descriptive of the quality of the attestators, as was manifested by him in the well-known case of *Wyndham v. Chetwynd*.

In the case of *Wallis v. Wallis*,⁽ⁿ⁾ wherein both *Trimmer v. Jackson*, and *Peate v. Ougley* were cited, there seems to have been some doubt on the subject of publication. The case, however, though argued only at the assizes, shows the opinion of Mr. Justice Denison, as to the necessity for the witnesses to know what instrument they were signing, to be in correspondence with that of Lord Mansfield, and the judges who decided the case of *Trimmer v. Jackson*.† It is, therefore, here extracted for the perusal of the reader.

Thomas Wallis, Esq. made his will, and therein devised his real estate to his wife for life; the will was of his own hand-writing; and the form of the attestation was in these words, signed, sealed, published, and declared for the last will and testament of the said Thomas Wallis, in the presence of us, &c. Isabella Matthews, James Wardell, William Powell. The heir at law brought an ejectment; the widow pleaded the devise to her for life. The cause came on to be heard at the summer assizes at Lincoln, 1762, by a special jury, before Mr. Justice Denison. To prove the execution of the will, the defendant produced William Powell, the testator's coachman, one of the three subscribing witnesses, who deposed that, in the beginning of July, 1760, James Wardell, then butler to *the said Thomas Wallis, came and told him, the said Powell, that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him and the said Wardell, and one Isabella Matthews, then his housekeeper, up to the table to him, where they all came; then the said Thomas Wallis further addressing himself to them all, desired them to take notice, and then took a pen, and in all their presence, signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the direction of the said Thomas Wallis, in his presence, and

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(n) 4 Burn. Eccl. L. 127.

† But observe what was said by Lord Hardwicke as to the necessity for publication, 3 Atk. 161. *Ross v. Ewer*; and see some further remarks on this subject in Part III. of this Chapter.

in the presence of each other ; he showing them severally where to write their names. But then the said Thomas Wallis, otherwise than as above, did not declare or publish either part to be his will, or say what it was.

The counsel for the plaintiff contended, that this was not a sufficient proof by one witness, of a complete execution of the will. And they produced, on the other hand, the other two subscribing witnesses, who, in divers particulars, did not give a clear and distinct evidence, and could not recollect whether they had signed one or two papers, or whether then, or at any time before the said Thomas Wallis's death, they understood what they had so witnessed to be the said Thomas Wallis's will, though Wardell seemed to admit he conjectured it so to be. But both Wardell and Matthews swore that they did not see the said Thomas Wallis sign or seal either part of his said will ; that Powell* the other subscribing witness, was not at that time in the room, when (at the said Thomas Wallis's desire) they wrote their names to the two papers as they now appear ; that the said Thomas Wallis did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called Richard Price, the said Thomas Wallis's groom, who swore, that one morning, in the beginning of 1760, James Wardell told him that his master had much wanted him ; and that upon this, the said Price's offering to go to his master to receive his orders,

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*the said Wardell told Price that the business was done, and that Powell had supplied his place ; and that he the said William Powell, James Wardell, and Isabella Matthews, had that morning been witnessing their master's will. And Sarah Dixon being called, swore, that in the beginning of July, 1760, Isabella Matthews came one morning after breakfast into the kitchen, and told her, that she the said Matthews, James Wardell, and William Powell had that morning witnessed their master's, the said Thomas Wallis's will, though he had not told them it was so. Upon this state of evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, publication of a will was an essential part thereof ; and if so, there is nothing in that statute to take it away : and further, it was insisted, that by the said statute there are four requisites to constitute a good and valid devise of lands : first, that it shall be in writing ; second, that it shall be signed by the party devising, or by some

other person in his presence, and by his express directions ; third, that it shall be attested and subscribed in the presence of the deviser, by three or four credible witnesses ; fourth, that the words attested and subscribed must import, that it shall be published as a devise or will by the testator in the presence of the said witnesses.

On the contrary, for the defendant it was insisted, that neither before nor since the statute, publication was necessary ; and that by the statute only the three first requisites are necessary, which in the present case were all complied with, the devise being in writing, and signed by the testator in the presence of three credible witnesses, who had subscribed their names as witnesses to the same in the presence of the testator and of each other : and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made ; that the testator using these significant words to all the witnesses, when he called them up to the table, "take notice," and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient excuse and publication of his will. That the words "signed, sealed, published, and declared," being all written in the testator's own hand-writing, and the witness, Powell, swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names, and it appearing by the evidence of Price and Dixon, that both the other witnesses had declared that they had been attesting the said Thomas Wallis's will ; this was much stronger than the case of Peate and Ougley, reported in Comyns, 197. And Mr. Justice Denison was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication ; and for this he cited the case of Trimmer and Jackson, lately determined in the court of King's Bench ; and the jury found, accordingly, a verdict for Mrs. Wallis, defendant. Nevertheless, the plaintiff's counsel insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above ; but the

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matter was compromised on the defendant's remitting the costs. (117)

A will may be written upon any material, and in any language or characters.

(117) Neither the statutes of Henry the Eighth, or that of Charles the Second, have imposed any restriction upon the testator as to the material upon which, or the language in which the will is to be written ; it signifies not, whether it be written on paper or parchment, or whether the language in which it is composed be English, Latin, French, or any other idiom, nor in what hand or letters, whether in a secretary hand, court hand, or Roman hand, so long as it is fair and legible, so as to be read and understood ; neither is it material whether the same be written at large, or by notes or characters, usual or unusual. So also, if some words be omitted, or an improper sentence used, provided the meaning and intent is apparent : as, where a man says, " I make my wife of this my last will and testament," leaving out the word *executrix*, the will is good, and the omitted words shall be understood. But if the will be so written as that it cannot by any possibility be read, or if, when read, it is perfectly unintelligible, the will is of necessity void. But in *Masters v. Masters*, 1 P. Wms. 425, where the will was written so carelessly as to be scarcely legible, and the legacies were in figures, it was referred to a master to examine what those legacies were, and ordered that he should be assisted by such as were skilled in the art of writing. Vid. *Swinb.* part 4, sect. 25.

Of the local extent of the statute.

As the local extent of the statute of frauds has sometimes been a question on the application of this clause concerning the execution of wills, it may seem proper to say something on that head, which, perhaps, may be more suitably introduced in a note than in the text. In some of our colonies, the statute of frauds, in respect to the attestation of wills, has been received as law, and become established by usage ; and in others, its regulations have been partially or generally adopted and established by act of assembly. But where neither usage nor act of assembly has introduced the statute of frauds, the resort must be to the general and received maxims upon which our courts have proceeded in determining the question, whether a law has place in any of our plantations or colonies. And to furnish the reader with some grounds for forming a general judgment on these questions, I have transcribed a page from the Commentaries of Sir William Blackstone on the subject. " Plantations or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country ; or where, when already cultivated, they have been either granted by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies with respect to the laws by which they are bound : for it hath been held,

*PART II.

IT seems now proper to consider the extent of this clause of the statute of frauds, with respect to the subjects to which it is applicable : and first, it may be received as settled doctrine, That the statute does not extend to copyholds.

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that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own own situation and the condition of an infant colony ; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and, therefore, are not in force. What shall be admitted, and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and controul of the King in Council ; the whole of their constitution being also liable to be new modelled and reformed by the general superintending power of the legislature of the mother country.

But in conquered or ceded countries, that have already laws of their own, the King may, indeed, alter and change those laws ; but till he does actually change them, the ancient laws of the country remain, unless such are against the law of God, as in an infidel country. 7 Rep. 17, Calvin's case, and Show. Parl. Cas. 31. Our American plantations are principally of this latter sort, having been obtained, either by right of conquest, and driving out the natives, (with what natural justice I shall not at present inquire) or by treaties ; and, therefore, the common law of England, as such, has no allowance or authority there ; they being no part of the mother country, but distinct, though dependent dominions. They are subject, however, to the controul of the parliament ; though (like Ireland, Man, and the rest) they are not bound by any acts of parliament unless specially named. Vid. 1 Blackst. Comm. P. 106 ; and see Salk. 411.

According to these rules it was said by the Master of the Rolls, Sir Joseph Jekyll, to have been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does

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that copyholds are not affected by its requisitions, but *stand clear of this statute as well as of the statute of wills, and the statute of uses. It has before been observed, that †the statutes

not bind in Barbadoes, 2 P. Wms. 74 ; and that the Island of Bermuda is not affected by it, appears by the case of *Sheddon v. Goodrich*, 8 Vez. jun. 4. 81. The argument of Lord Mansfield, in the case of *Campbell v. Hall*, Cowp. 204, is highly deserving of the reader's attention, where he will find the following positions learnedly sustained : That a country conquered by the British arms, becomes a dominion of the King in right of his crown, and, therefore, necessarily subject to the legislature—the parliament of Great-Britain. That the conquered inhabitants, once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. That the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives. That the laws of a conquered country continue in force, until they are altered by the conqueror : the universality and antiquity of which maxim is shown by the absurd exception as to Pagans mentioned in Calvin's case ; for that distinction could not exist before the Christian era ; and in all probability arose from the mad enthusiasm of the Croisades. That if the King, without the concurrence of parliament, has a power to alter the old and introduce new laws into a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to *fundamental* principles : he cannot exempt an inhabitant from that particular dominion ; as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects ; and so in many other instances which might be put. That this power of legislation in the King alone, over a conquered country, continues in him only while such country remains in a state of conquest ; but that if a constitution be given to such country by proclamations, grants, or otherwise, and from being in a state of conquest, it is erected into a colony with provisions for a subordinate legislation and administration of its own, the crown is precluded from an exclusive authority to legislate for such conquered country, and no law can be imposed on the inhabitants but by the acts of their own assemblies, or by act of parliament. I shall close this note with observing, that as the devise of lands in other countries will

of Henry VIII. required the tenure to be in soccage, which is not the description of copyhold tenure, and, therefore, for that reason the statutes of wills would not apply to this description of estate. We observe also, that copyholds could not be considered as having been embraced within the intention of those statutes, which was to revive the testamentary power with certain qualifications and restrictions, after the statute made for carrying the possession and legal estate to the use had either suppressed its exercise, or driven it upon new and multiplied expedients for its preservation. The statute of uses had not interfered with the uses raised upon surrenders,^(o) those being properly executed by the admittance, which operated as a new grant thereof by the lord made pursuant to the surrender. Neither, indeed, could it be properly said, that copyholds were ever devisable, for a will can have no effect upon them as a will, so that it was always necessary first to pass the estate by a surrender thereof, into the hands of the lord, to such uses as the surrenderer should, by his last will, appoint, and then his will succeeded to this act as an appointment or declaration of the use.^(h)

Reasons for holding copyholds to be out of the statute.

By thus regarding the surrender as the mean whereby the lands themselves are transferred, and the will as having no specific operation under the statute of wills, but as a mere declaration of a use, or rather an appointment of the person to be admitted upon the surrender, we see the reason (not *always indeed approved of) for holding wills of copyhold lands to be out of the statute of frauds, there being no *special* provision applicable to copyhold estates contained therein. Accordingly, in *Carey v. Askew*,^(g) it was held by Sir Lloyd Kenyon, Master of the Rolls, that any testamentary paper would be sufficient to pass copyhold lands; and his honour said, he hardly expected to hear it seriously argued: it had been held that a will received by the ecclesiastical court will govern the surrender of a copyhold. It

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(o) 2 Vez. 257. (p) See the case of *Royden v. Malster*, 2 Roll. Rep. 383. (q) 2 Brown, C. R. 58.

depend upon the law of those countries, so, if an Englishman being beyond sea, make a will disposing of lands here, such will must have the requisites prescribed by the statute. See *Copin v. Copin*, 2 P. Wms. 290.

would be removing landmarks to entertain a doubt upon the subject.

Lords Mac-
clesfield and
Hardwicke
not satisfied
with the rea-
sons.

Lord Macclesfield^(r) admitted the same doctrine as perfectly settled in his time, though certainly not with any approbation of its reasons. He said that it was plain, that as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good, and his opinion was, *never to shake any settled resolution touching property or the title of land*, it being for the common good that these should be certain and known, *however ill-grounded the first resolution might be*; but if that had not been settled, it might be more reasonable to say, when I have surrendered my copyhold to the use of my will, a will of this copyhold shall be so executed, and in such a manner, as by the act of parliament a will of lands ought to be executed; but this case having been ruled otherwise, ~~he~~ would not shake it, though he would not carry it one jot farther. Agreeable to which opinion of Lord Macclesfield was that of Lord Hardwicke in the Attorney-General v. Andrews,^(s) who, after mentioning this established doctrine in respect to wills of copyholds, observed that, perhaps, if those determinations were now originally to be considered, courts of law and equity would not have gone so far, and that it might be wished it were altered, as it is subject to the same inconvenience as the devise of freehold lands.

*[320]
Same doc-
trine as to
trusts of co-
pyholds.

*The sentiments of Sir Joseph Jekyl seemed to accord with those of Lord Chancellor Macclesfield, on the impropriety of going *one jot farther* than the doctrine had already gone in respect to the devises of copyholds; and, therefore, he took a distinction between a devise of the *legal* estate in a copyhold, duly surrendered to the use of the will of the surrenderer, (as to which he admitted that the attestation of witnesses was not necessary) and the devise of a *trust* or *equity of redemption* of a copyhold.— This opinion appears in a memorandum of the reporter in 2 P. Wms. 259, annexed to the case of Wagstaff v. Wagstaff, which was as follows; “Memorandum in Hill. vac. 1727, in a cause at the Rolls, his Honour admitted it to be settled, that where a copyhold in fee is surrendered to the use of one’s will, such will, though executed in the presence of one or two witnesses, is

(r) 2 P. Wms. 258. (s) 1 Vez. 225.

good, because it passes by the surrender and not by the will, which is only a declaration to the use of the surrenderer, but that if a copyholder be seised only of the *trust* or *equity of redemption* of the copyhold, and devise such trust, or equity of redemption, there must be three witnesses to the will ; for here can be no precedent surrender to the use of the will to pass this trust ; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds and perjuries, otherwise great inconvenience would arise therefrom ; and it is no prejudice to the lord of a manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate in the copyhold, is tenant to the lord, and liable to answer all the services."

But in *Tuffnell v. Page*, before Lord Hardwicke, in 1740, a different opinion, and which seems to be the doctrine as now understood, was maintained by that Chancellor on this subject.—His Lordship said, he would consider the case in two lights—first, whether the will of a copyholder, unattested by witnesses, was sufficient to declare the uses of a surrender, made to the use of a will ; and secondly, where there is no surrender, as in the case before him, whether such a *will was sufficient to pass the trust of the copyhold lands to the plaintiff. * [321]

With respect to the consideration of the question in the first of these lights, his Lordship said, that, where a man was seised of copyhold lands, and surrendered to the use of his will, and executed a will, though not attested by witnesses, yet it should direct the uses of the surrender ; for the clause in the statute of frauds and perjuries, which required the testator's signing in the presence of three witnesses, and their attestation in his presence, was confined only to such estates as passed by the statute of wills, 34 H. 8, c. 5, which was an act to explain one made in the 32d of the same King ; and which, at the close of the section, enacted that the words, 'estate of inheritance,' in the former statute, should be declared, expounded, taken, and judged of estates of fee simple only, which showed plainly, that it did not extend to customary estates, and had been so settled ever since the case of the Attorney-General *v. Barnes*. This was reported in 2 Vernon, where it was said in page 398, "as to such of the lands as were copyhold, it was agreed they were well appointed,

they passing by surrender, and not by will, though there were no witnesses to it."

The trust of a copyhold estate will pass by a will unattested according to the statute of frauds.

As to the second question, whether the will of William Springet would pass the *trust* of the copyhold lands, his Lordship said, "that where the legal estate was in trustees, the *cestuy que trust* consequently could not surrender, but the lands should, notwithstanding, pass by this devise, according to the general rule that equity follows the law; for a copyhold would pass under a will without three witnesses, or where there were no witnesses at all; and if this nicety was not required in passing the legal estate, *a fortiori* it was not in passing the *equitable*: and, therefore, the *cestuy que trust* might, by the same kind of instrument, dispose of the trust estate, as if he had the legal estate in him."

* [322]

Whether such appointment or declaration of the uses of a copyhold surrendered may be without writing?

This doctrine, therefore, upon the statute in respect to copyholds, may be regarded as irreversibly settled upon the *authorities, and it is now a sure proposition, that no attestation is requisite to an instrument in the nature of a will designed to carry into effect a previous simple† surrender of copyhold land to the uses thereof, but that any paper having a testamentary operation, and received in the ecclesiastical courts as such, is sufficient. It has even been doubted, whether such testamentary appointment may not be by parol; for if copyholds are not affected either by the statute of wills, or by the clause respecting wills in the statute of frauds, a testamentary disposition of them, as such, seems to be no more necessary to be in writing, than the devises by the custom of particular places which operated independently of the statute of wills, and might *after* that statute, and until the statute of frauds expressly restrained them, have been made by word of mouth; and if such wills of copyholds be regarded as mere appointments, they are still clear of the first and third clauses of the statute—by the exclusive wording of the first, and by the express exception in the last. But regarding them as declarations of uses or trusts, I humbly apprehend there is good ground for holding them to be within the compass of the 7th section of the statute.

An attested will of copyhold may be revoked by an unattested will.

As the attestation of three witnesses is not *necessary*, so neither has it any *efficacy* in respect to copyholds; so that if a sur-

† That is, where the surrender is silent as to the forp.

render be made to such uses as the surrenderer shall appoint by his will, and he afterwards make his will, executed and attested according to the statute of frauds, such will is nevertheless subject to be revoked or republished by him by any subsequent testamentary paper, attested by one or two witnesses only, or without any attestation at all.^(t) But if a surrender be made to the use of a will, to be executed with these or any other solemnities, it is clear that such prescribed requisites must be strictly complied with as in other similar cases.^(u)

*It should be observed, before this part of the subject is dismissed, that although a will of copyholds is said to work as a declaration or appointment of the use only, and this is the ground upon which it is held to stand clear of the clauses regarding wills in the statute of frauds, it partakes of the quality of a will in many essential particulars; thus it is revocable by alteration or cancelling, and is altogether an ambulatory instrument until the death of the party; so that if the appointee die in the lifetime of the testator, I apprehend it to be quite clear, that the devise fails; for the act remains incomplete, and the instrument is without operation and mute until the testator's decease. And it is to be remembered, that in respect to freeholds, a will to pass lands in virtue of a power, must have the ceremonies by the statute of Charles made necessary to wills of land, and so, if the subject be personalty, the will must be rendered effective according to the statute in respect to wills of personal estate.⁽¹¹⁸⁾

But although it seems now to be regarded as settled, that the trust or equity of a copyhold estate will pass by a will not executed or attested according to the statute of frauds, upon the principle of *equitas sequitur legem*, and on the ground that a strictness which had been dispensed with in respect to the *legal* estate in copyholds, ought *a fortiori* to be dispensed with in respect to the *trust* estate in copyholds, yet a different doctrine seems to be es-

* [323]

How far such will, though it operates as an appointment or declaration, partakes of the qualities of a will.

A will disposing of the equitable estate in customary freeholds must be executed and attested according to the statute.

(t) Vid. *Burkitt v. Burkitt*, 2 Vern. 498. (u) Vid. *Cotton v. Laver*, 2 P. Wms. 623.

(118) *Duke of Marlborough v. Lord Godolphin*, 2 Vez. 76, 77, an instrument in its nature testamentary, made in execution of a power, has all the incidents belonging to a will, *Hatcher v. Curtis*, 2 Eq. Ca. Abr. 671. *Oke v. Heath*, 1 Vez. 135. *Lawrence v. Wallis*, 2 Bro. C. R. 319.

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established concerning the equitable interest of a *customary freehold*, where there exists no custom of the manor for surrendering them to the use of a will. This was determined in the case of *Hussey v. Grills*(x) where Elizabeth Prowse, being seised of a customary estate within the manor of Stoke Climaland, in Cornwall, surrendered it to Thomas Jones and his heirs, who afterwards declared the trust to be for Elizabeth Prowse, her heirs and assigns, and covenanted to surrender *to such uses, as she should by deed, executed in the presence of two witnesses, or by her last will appoint. E. Prowse afterwards made her will on the 24th January, 1753, in writing, but not attested according to the statute of frauds; (but which seems to be mistakenly reported,(119) as the decision and reasoning of the case plainly supposes and requires the will to have been effectual, and consequently executed according to the statute) and devised the customary estate to Margaret Archer, her heirs and assigns forever. She afterwards made a codicil in her own hand-writing, but unattested, and thereby revoked the devise in her will of the customary estate, and gave it to Margaret Archer for her life only, with remainders over; and the doubt was, whether the codicil was a good revocation of the will, and passed the customary estate.

The Lord Chancellor Hardwicke said, that the question was, whether these customary estates were, in point of conveyance or devise by will, so far like copyholds, that the determinations with respect to the latter shall govern these in like manner and parity of reason. That courts ought to avoid making large and liberal constructions to take cases out of the statute of frauds; which was made to ascertain property, and the words whereof were very extensive. That copyholds were not devisable by will, nothing passing out of the surrenderer till the will was made; and when it was made, the lands did not pass by the will; the devisee might come and be admitted, on the foot of the surrender and will taken together; just as if the name had been inserted in the surrender itself. That the ground of his opinion in *Tufnell v. Page*, was *equitas sequitur legem*. That customary freeholds and

(x) Ambl. 299.

(119) The cases in Ambler seem to be a very careless compilation.

copyholds differed extremely in their nature; the latter being of a base tenure, and by the old common law, held at the will of the lord, though now established on a more firm footing: customary freeholds never were of the base kind. That Jones was a trustee, and the legal estate was in him. There *was no evidence that there could be in that manor a surrender of a customary freehold. It was agreed there never was such. That the foundation of the determination as to copyholds was, that the party might dispose by surrender and will. As there was no method of passing the legal estate of these customary freeholds in that way, there was no reason to hold them out of the statute. And if the legal estate was not so, so was not the trust. There was something, observed his Lordship, arising out of the declaration of trust, which induced him not to make a large and liberal construction; for, as two witnesses were required by it to the execution of a deed, it seemed strange to think, that in case of execution by will, it might be on a loose paper, without any witnesses at all.

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It seems scarcely necessary, after the opinions and determinations which have been produced, to observe to the reader, that in a devise of a *trust*, or *equitable estate* in freehold lands, the formalities of execution and attestation, required by the statute, are as necessary to be observed as in wills disposing of the *legal estate*. There can be no question, said Lord Macclesfield,(y) but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were occasioned before the statute, by a devise of the legal estate in fee simple.

All equitable estates of freehold must be devised by a will executed and attested according to the statute.

Though the necessity imposed upon the testator by the statute of Charles of making a written will, if he mean to dispose of lands and hereditaments, was already a condition of their validity by the statute of wills, yet this requisition of the second act was not nugatory, since lands that were devisable by local custom, (for enforcing the testamentary dispositions whereof the register has furnished an appropriate writ)(z) were left untouched by the statutes of Henry, and continued, notwithstanding these laws, to be devisable by parol, till they were brought under the

Wills of lands devisable by custom, must be in writing by the express direction of the statute.

(y) 2 P. Wms. 258.

(z) *Ex gravi querela*.

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the common restrictions of the statute of frauds, which laid upon all real hereditaments, copyhold estates *excepted, the same necessity for a written publication, with the ceremonies of the signature and triple attestation superadded.(120)

Powers of appointment to be executed generally by will, without any directions as to the mode in which such will is to be executed, must be executed by a will attested according to the statute.

And the same doctrine holds in respect to trust estates.

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Where a power is given, or reserved by deed to be executed generally by a will, without any words expressing or importing the manner in which such will is to be executed, if the subject of such power is real estate, the power will be ill executed by any will not signed by the testator, and not attested by three witnesses, by the subscription of their names in his presence, according to all the circumstances required by the statute to give effect to a devise of lands. Lord Macclesfield, in *Longford v. Eyre*,(a) much doubted whether the will in that case would have been a good appointment, had it not been executed pursuant to the statute; because, said his Lordship, when a power is given to appoint the uses of land by deed or will, the will must be intended to be such a one as is proper for the disposition of land, and, consequently, should be subscribed by three witnesses, in the presence of the testator. For this is within all the inconveniences which the statute of frauds intended to prevent, and the words *in the nature of a will*, mean the same as a will, which must therefore be subscribed by witnesses in the presence of the testator. And, according to the same Chancellor, in *Wagstaff v. Wagstaff*,(b) if the *trust* of lands be limited to such persons as a man shall by will appoint, and the *cestuy que trust* devises these lands by a will executed only by three witnesses, the will is void, and will not operate as an appointment. In confirmation of which, it was said by Sir John Strange, at the Rolls, in introducing his judgment in *Jones v. Clough*,(c) that “where the owner of an estate in land, *either in law or equity*, reserves to himself a power of disposing of it to such uses as he by will shall appoint, that must be

(a) 1 P. Wms. 741. (b) 2 P. Wms. 258. (c) 2 Vez. 366.

(120) But it may still in some certain cases be necessary to resort to the custom of a place; as, where it enables an infant of *fourteen*, or, perhaps, a *feme covert*, neither of whom is capable under the statutes of devising lands. Vid. 2 And. 12, where it is said that a custom enabling an infant under 14, at which age, and not before, the law supposes some discretion, would not be good.

such a will as within the statute of frauds would be proper for a devise of land; otherwise the statute would be entirely evaded."

But if the power extends over personal as well as real property, though a will made in execution of the whole power fail as to the land for want of a sufficient attestation, it may nevertheless be a good and valid execution of the power with respect to the personalty. Thus, where a man, by his will, had given several shares in the Sun-fire Office to his daughter, and, after her decease, to such persons as she should by her will direct; and had also devised real and personal estate in Jamaica, in moieties, the one moiety to Frances for life, and, after her decease, to such person as she should by will direct; the other moiety to another person, in like manner; the daughter, by her will reciting that of her father, disposed of the Sun-fire shares, and also by the same will devised the real estate, but the will was not duly executed to pass real estate, being attested by two witnesses only; and Lord Chancellor Thurlow held, that the will being sufficient to pass the personal estate, was so far a good execution of the power. (d)

If an agreement be entered into, to charge certain lands with a sum of money for the benefit of certain persons named, in such shares as a *third* person shall direct by his last will, such will need not be executed as the statute requires for passing real estate; but if one or more having the inheritance in them of certain lands, agree that *one of them* shall have power to charge the same with any sum by his last will, this power can only be well executed, as it should seem, by a will with three witnesses. This doctrine is furnished by the case of *Jones v. Clough*, (e) determined at the Rolls by Sir John Strange, which case was, in effect, as follows:

On the marriage of Thomas Clough, an estate was settled to the use of himself for life, remainders in the common manner *in strict settlement. When John, the eldest son of the marriage, and Thomas, the younger, came of age, articles were entered into, reciting the settlement, and that "whereas there was thereby no provision or portion for maintenance of younger children, though several were then living, to the intent therefore that 300*l.* might be raised, Thomas, the father, John, the son and heir, and Thomas, the younger, had taken it into consider-

But if such power extends to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass personal estate.

If an agreement be entered into to charge lands with such sums as a stranger shall by his last will direct, such direction will be good if made by an unattested will—but it is otherwise, if such power be given or reserved to the owner, or to one of the owners of the inheritance.

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(d) *Duff v. Dalzell*, 1 Bro. C. R. 147, et vide *Powell v. Beresford*, Lord Raym. 1282. (e) 2 Vez. 365.

ation, and agreed, that 300*l.* should be raised in and upon all or part of the premises, from and immediately after the death of Thomas the elder, and to be paid to such younger children in such manner and form as *he* should, by his last will, *duly executed*, direct and appoint; and in order to have the same effectually done and assured, the two sons did covenant, grant, promise, and agree, jointly and severally, for themselves, their heirs, &c. that after their father's death, any part might be granted, mortgaged, or disposed of, for raising the 300*l.* to be paid as the last will and testament of Thomas the elder, should direct and appoint, and to no other use. The father, by will, attested only by two witnesses, particularly distributed this 300*l.*

John dying without issue, having suffered a recovery of part, Thomas became tenant in tail of the rest, and now insisted, that the provision, made for himself and the rest of the children, could not take effect, as not being a proper execution of the power, the will not being such as would pass lands, according to the statute of frauds, all the requisites of which were required by these articles, and the addition of *duly* was equal to *legally*.

But the Master of the Rolls delivered a contrary judgment, observing, that it was to be considered, whether the father, by the articles or will, parted with any thing in his power to give. By the settlement, he was bare tenant for life; and by the articles had granted nothing, the charge being to take effect *after his death*. The agreement, indeed, was recited to be between the father and two sons, and referred to the act of the father by will *duly executed*; but in the next *clause, which was to charge the estate, the two sons only covenanted and granted to the trustees, that this 300*l.* should be a charge; and it was upon *their* estate; and the intervention of the father was only to *apportion* the sums. It was not his will that actually made the charge; he was only referred to as a proper person for that purpose. This cause was attended with such circumstances, that the court was well warranted to go as far as they could, to relieve the person standing in the place of the younger children, especially against him who was to have the benefit of the articles, but who by the accident of his brother's dying, without issue, had turned the tables; it was more for his benefit to say, they should not be carried into execution. He might have been greatly benefited by the articles; for the father might have appointed any given sum, so as to have

distributed something to all, and 290*l.* to Thomas. The word *duly* was in the agreement, as recited, but not in the covenant of the two sons. But it was not necessary to lay any great stress on that; because, supposing it was the case of the owner of an estate, reserving to himself a power by will, without adding *duly* or *legally*, his Honour admitted, that in such case his act must have been such, as would have answered the utmost idea of the word *duly*, though the word *will* had been only mentioned. But certainly there might be cases, where the words *duly executed* might not require the solemnity of the statute of frauds; for if no lands were given by the person making the will, that would be *duly* executed, though there were not those witnesses, which the statute required to pass real estate, because these words must refer to the *nature* of the act, and the *nature* of that which passed by it. Yet, if the word *duly* were to be construed otherwise, there *have been cases* where a court of equity, under such circumstances, would supply it. That in the case before him, two persons who had power to charge the estate, had done it by articles, but referred to the act of a third, merely for the purpose of apportioning; and though that third happened to be a father, it would be the same as if he had been a mere stranger. If, therefore, one should charge his estate with a sum, to be divided as a mere stranger should think proper, by will, the necessity for its being a *will conformable to the statute, did not occur; and whether there were two or three witnesses, it was such a circumstance, as when the intent fully appeared as in the present case, a court of equity would supply.

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His Honour added, that it was not necessary to criticise very nicely on the import of the word *duly*; but that, where a provision for younger children was thus attempted to be defeated by one who was a younger child, one would lay hold of any circumstance whatever on which any weight was to be laid; and supposing the father, having no land estate, executed a will, whereby his intent was sufficiently declared, in what manner this should be divided, it was good, though there were no such circumstances as required, whereby any interest was to pass from him. There was no occasion to consider, whether the whole must have fallen to the ground, if the father had made no will or appointment, or whether the court would, in such case, have interposed for the younger children. There have been cases, where a provision of

that sort has been referred to the account of a third person, which, if not executed, this court has thought proper to direct to be equally divided ; but that that needed not thus to be determined, because, as his Honour was of opinion, that the will, though executed in the presence of two witnesses only, considering it as a will whereby the father passed nothing at all by way of interest from himself to them, but merely as a collateral person, there was sufficient within the authorities mentioned to warrant this opinion, that it was a proper execution of this power.

Some essential distinctions to be attended to in reading the above case.

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When equity will help a defective execution of a will.

We should not read the above case, without remarking the judge's observation, that even if the force contended for were given to the phrase *duly executed*, "there had been cases in which a court of equity, *under such circumstances*, would supply it." By which his Honour must not be understood to mean, that where a power is given to appoint real estate by a will, duly executed, or by will generally, such appointment will have the aid of equity, if it be not executed by a will according to the statute ; but that, *under such circumstances*, "that is, where the subject of disposition is not such as does of itself call for the application of the statute, being *personal estate*, if a power be to appoint the same by a will in the presence of three witnesses, or attested by three witnesses, or by any other form of celebration, these circumstances of accompaniment being stipulatory forms only annexed to the power, without which the will would be intrinsically good, according to law, courts of equity, in behalf of certain favoured objects and considerations, will supply such little formalities, for the sake of the substantial intention of the parties. But if a power over real estate is to be exercised by will, inasmuch as there can be no will at all of such property, unless it be perfected in the manner prescribed by the statute of frauds, if a will be made without being so perfected, it is as if the power were attempted to be executed by a *totally different instrument*, from that to which it was expressly made subject.

The case of *Sayle v. Freeland* and others, infants, reported among the chancery cases in *Ventris*, (f) referred to by Sir John Strange, in the case above produced, is not at variance with the principle of this distinction. There the bill was to redeem a mortgage made by the father of the defendant, or to be foreclosed. The defendants by guardian answered, stating that their grandfa-

ther was seised in fee, and made a settlement, whereby he entailed the estate, but with a power of revocation by any *writing under his hand and seal, in the presence of three witnesses*; and the case was, that he made his *will* under his hand and seal, wherein he recited his power, and declared that he revoked the settlement; but the will had but two witnesses, who subscribed their names, though a third was actually present. The testator died, and the lands descended to the father, who made the mortgage; and the defendants claimed by virtue of the entail. But the Chancellor decreed, that the mortgage money should be paid; and first, he said, there was an execution of the power *in strictness*, for the third witness was *present*, though he did not *subscribe. But secondly, if there had not been in strictness a good execution of the powers, equity would help it in such a little circumstance, where the owner of the estate had fully declared his intention; further adding, that there was a difference where a man had power to make leases, &c. which would charge and incumber a third person's estate, which sort of powers were to have a rigid construction; but where the power was to dispose of a man's own estate, it was to have all the favour imaginable. Here, we observe, that the power was to be exercised by a *writing*, and not necessarily by a *will*, executed in the presence of three witnesses; and although the party chose to execute the power by a *writing*, in the form of a will, and that will not such a one as would have a testamentary operation under the statute of frauds; yet it was not the less a *writing*† published under hand and seal in the presence of witnesses.

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If, however, the power in the last mentioned case had been reserved to be exercised by *will* nominatim, with certain formalities not conformable to the statute, such as the attestation of two witnesses only, it may be doubted, whether the same judgment would have been pronounced;‡ but it is well established, that a disposition of lands may be made by a *writing, surporting to be a will*, though the same be not executed according to the statute of

Whether a power can be reserved or given to appoint or make disposition of real estate by a will unattested according to the statute?

† But as these instruments have no specific operation as wills, but work as appointments merely, should they not be stamped accordingly?

‡ But if such a disposition be bad, it must be so on the ground of the power's being void in its creation, as contravening an act of parliament. I have met with no case full to this point.

frauds, by virtue of a power of appointment, under the uses of a proper conveyance, in terms defining the particular mode of execution.

A man cannot by *will* reserve a power of disposing of real estate by a future unattested will or codicil.

*[333]

But though a man by first passing the land by a sufficient conveyance, may empower himself to make a future disposition thereof by a writing, with one or two witnesses, and *under such a power, a will, or writing purporting to be a will, if attested according to the terms of the power, will be a good instrumentary execution of the power ;(121) yet it has, upon very satisfactory reasons, been determined, that a person cannot by *will* enable himself to make any future disposition of land by any instrument, whatever, not executed and attested as the statute of frauds requires, in respect to wills of lands. If a will affects to reserve any power of disposition, such reservation is purely negative in its effect ; it *does nothing*, unless, perhaps, it serves as a positive expression of its own non-effectiveness, as to certain subjects, or beyond certain limits. Such lands as a testator does not actually pass or dispose of by a present declaration of his mind, remain in him to be passed or disposed of by a future conveyance or will ; but by such only as are respectively competent in law, by the perfection of their respective executions, to the gift or transfer of the property, according to its nature and requisites. And this rule obtains equally in respect to legal and trust estates ; for trust estates are as much within the statute of frauds, with regard to the formalities requisite to the perfection of a will, as legal estates, since the same mischiefs would follow from the omission in the one case as the other.

Analytical view of the great case of *Habergham v. Vincent*.

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A full statement of the case of *Habergham v. Vincent*,(g) with a concise exposition of the reasonings on which the determination was founded, may help to guide the student in *his progress through this delicate and difficult learning. The case was thus :

(g) 2 Vez. jun. 304.

(121) For in such a case the disposition is not testamentary in its origin, but is to be regarded as merely supplemental to, or directing the operation of the conveyance from which the power springs. But whenever the disposition is originally and substantially testamentary, it is within the statute, and every part of such disposition, whether primary, additional, or supplemental, requires to be executed as the statute directs. *Fearne's Posth.* 43.

"Samuel Hill, who was seised in fee simple of several freehold estates in Yorkshire, and also in fee, according to the custom of the manor of Wakefield, of copyhold estates in that manor, made his will on the 5th of October, 1759, and thereby devised all the copyhold estates, which he had surrendered to the use of his will, and also all his freehold estates, to five persons by name, and the survivors and survivor of them, and the heirs of the survivor, in trust, by sale or mortgage of certain parts specified; and by mortgage of the rest, to pay all his debts and legacies, and to complete an agreement he had entered into concerning the purchase of an estate, and to pay 50*l.* *per annum*, for the maintenance of his grand-daughter, and to his son Richard Hill, for life, a further sum, in the discretion of his executors and trustees, not exceeding 150*l.* when the debts should be paid. Then upon farther trust, that upon the marriage of his grand-daughter, Betty Nuttall Hill, or upon her attaining her age of 21, the trustees should convey to her an estate for life, remainders to trustees to preserve contingent remainders, remainder to her first and other sons in tail-male, remainder to her daughters in tail-general, remainder to such person or persons, for such estate or estates, and subject and liable to such charges, provisos, and conditions, as he should by any deed, or instrument in writing, to be executed by him, and to be attested by two or more credible witnesses, direct, limit, or appoint, and to no other purpose. The testator then provided what should be done with the surplus rents and profits, to arise before his grand-daughter should attain twenty-one, or marry. This will was duly executed and attested, according to the statute.

By an instrument dated the following day, under the hand and seal of the testator, attested by two witnesses, stamped, and concluding like a deed, the testator recited his will, and that he had reserved a power to himself of disposing of his estate farther, and went on thus: "*Now, know ye, that by this my deed poll, I do direct and appoint, that my trustees, (naming them) shall,*"—and then he proceeded to direct, that his trustees should, immediately after the death of his grand-daughter, and failure of her issue, convey all the real estate to the first son of the said Richard Hill, and his heirs male; then to his second and other sons, in tail-male; then to his daughters in tail-general; with an exception of such children as he should have by a woman named Wild, and in default of such issue, to the right heirs of the survivor of his trustees, his heirs and assigns forever.

The testator died soon after, and left Richard Hill, his son and heir at law, Betty Nuttall Hill, his grand-daughter, and all the trustees, surviving. The grand-daughter married, but no conveyance of these estates was ever made. At her marriage several of the trustees were living. She died soon after her marriage, and then two of the trustees were living. Her father, Richard Hill, lived eight years after her, and at his death only one trustee, George Stansfield, was living. The trustee proved the second instrument in the ecclesiastical court as testamentary, and the general question arose between the surviving trustee and the heir at law of the testator.

I shall call the reader's attention to the several points distinctly and successively, as they arose in the case. And first, we are to observe that, considering the second instrument as void and out of the way, the trustee claimed the whole for himself, on the ground that the legal estate, under the will, independently of the deed poll, was vested in him, and remained in him, after all the limitations failed for want of objects; and that, therefore, there was no resulting trust for the heir at law. As to which point, Mr. Justice Wilson made the following observations: "That the estate was given to five persons in trust, first for payment of debts; that was—in trust for a purpose which might last for ever; and that the cases were innumerable to prove that such a trust affects the whole estate. If so, the consequence was, that by the first devise of all his real estate to these five persons,* the testator gave only the mere legal estate, and that the trust was entirely undisposed of, except as to those express dispositions by the will for payment of debts and legacies, to complete a purchase, &c. As far as that trust estate was disposed of by the will, so far it was disposed of; as far as it was not, so far it was undisposed of; and the trustee could not say that the words giving all to him, would pass both the legal and equitable interest; and that it rested with the heir to show, that the equitable interest was taken out of the trustee by an express disposition. It was enough for the heir to say, that it was not given to any one else; and that it rested with the trustee to show, from the other parts of the will, that the equitable interest, or part of it, was given to him. He claimed under the *will*, and could *only* claim under the *will*, and must therefore show, that it was given to him by the will. That this way of considering the point, removed

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the only argument used in support of the claim of the trustee, namely, that part of the equitable interest was expressly given to the heir, 50*l.* a-year till the debts were paid, and 150*l.* a-year afterwards; from which it had been concluded, that part of the equitable interest being expressly given to him, nothing more was meant to go to him. But that what the intention was in that respect was immaterial, if it was not actually given to some other person; for that there was no way to exclude an heir, but by giving the estate to somebody else. And that, therefore, if from the circumstance of part being so given, an inference *could* be raised, that the testator meant the heir should have no more, yet even against the intention the heir should take.

Since, therefore, under the will, the trustee could not support his personal title in opposition to the resulting trust for the heir at law of the testator, his next reliance was on the ultimate disposition by the subsequent instrument in favour of his own heir at law. And to decide this question, it was necessary to determine the quality and effect of that instrument. If it was a deed, and incapable of being considered in any other light, as two instruments of a different *nature and genus could not unite, the limitations by the deed, if as a deed it could operate, would be too remote, being not to take place in a connected and continued series upon the precedent estates created by the will, but to have their commencement upon the termination of them; or, in other words, as being to spring up as executory trusts after an indefinite failure of the issue of the grand-daughter, they would be too long postponed to be within the allowance of the law; and as the Court of King's Bench, when the case came to them from the Court of Chancery, considered the second instrument as a *deed*, they returned an opinion to that effect. If the deed poll could operate as a testamentary instrument, *and was in that view of it capable of uniting with the will*, then the limitations created by it might flow in a connected series after the estates given by the will, and might consequently be regarded as contingent remainders; and if the limitation to the heirs of the surviving trustee was a contingent remainder, then a consideration would arise in respect to the freeholds, (which did arise in respect to the copyholds) *viz.* whether such remainder failed by the expiration of the preceding vested estates in the life-time of the trustee; which would have started the questions, whether, as it was a devise to

trustees upon trust to convey, and not a direct disposition to uses, the Court ought not to make the same conveyance *then*, as it would have made immediately after the death of the testator ; when, if it had been then called upon, it would have interposed trustees to support contingent remainders, according to the intention of the testator ; or whether the legal estate in the trustee would not, of itself, have been sufficient to support the remainders.

But the Lord Chancellor, assisted by the judges, determined this case upon principles which superseded these questions of relief, by concluding against the second instrument, under the consideration of it as a testamentary paper (in which light they unanimously allowed it might be regarded, notwithstanding its form of a deed) for want of a proper execution and attestation, under the statute of frauds and perjuries.

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If an instrument is not intended to have effect till the death of the party it is *testamentary* in its operation and quality, *whatsoever may be its form*.

It was clearly recognised and established for law in this case, that an instrument, whatever is its form, whether it be a deed poll or indenture, is testamentary in its operation and quality, if it be intended not to operate till the death of the party who made it. (*h*) The circumstance, and not the form, must decide the character of the instrument. Thus, therefore, this deed could have no other operation than as a testamentary paper ; and presented itself, under this *general* character, in three distinct lights—as a codicil—as an exercise of the power reserved by the will—or as an integral and original part of the will itself, by incorporation into its substance.

Now a codicil has a *distinct* commencement, and though it is said to be a part of the will, yet it becomes so by *first acting* upon the will, and in a manner drawing it down to the date of its own publication ; and can have no operation upon *freehold* estate, either *as part* of the will, or *by its own efficiency*, unless it be attested as the statute directs. (122)

(*h*) *Moor*, 177. 2 *Leon*, part 4, 159, 166. *Andley's case*, *Dyer*, 166 a. *Greene v. Proude*, 1 *Mod.* 177.

(122) If a testamentary paper, or writing, referred to by the will, is in being at the time of the will, it may be considered as if *inserted* in the will, and need not be attested.

As an exercise of a power of appointment, it is met by the rule, that a testator cannot, by his will, reserve a right to devise freehold estate by a future testamentary instrument, not attested according to the statute of frauds; however practicable this may be under the uses of a conveyance. Where there is a conveyance, and a power is reserved under the uses thereof, the estate is parted with, the land is gone, and the power, which is in truth only an executory use, is collateral to the land, and may be limited to be executed by any instrument whatever; by a *deed* or writing, or, perhaps, by a *will*,† with or *without witnesses for its *specific* operation is not in question, where the terms of the conveyance in reserving the power have defined the mode of its execution; though, as we have seen, if it be reserved to be executed by a will in general terms, the party will be understood to have intended a *proper* will, according to the statute. But by his *will*, a man parts with nothing before his death, till which time his will is ambulatory, incomplete, and revocable; he has the same absolute dominion he had before; and if by any subsequent act he parts with any portion of his estate, whether it be part of that already devised, or a part affected to be specially reserved for his future appointment, he parts with it *as owner*, and not *instrumentally*, and by virtue of an *original*, and not a *derivative* power.

But the truth seems to be, that every paper to which a will refers must be incorporated originally with the will itself, if real property is to be affected by it, or it can avail nothing, unless it is itself executed according to the statute of frauds. And further, the rule is, that an instrument properly attested, to incorporate into itself another instrument, not attested, must describe it so as to manifest distinctly what the paper is that is meant to be incorporated in such way that the court can be under no mistake.(i) Therefore, it did not appear to the court, in *Habergham v. Vincent*, that the second instrument, although testamentary in its nature, could be incorporated into the will; which referred to nothing actually in existence, but to an intention merely; and it has been sufficiently shown, that the will could create no power with a special mode of execution. In that case, Mr. Justice Wilson said, that he believed it to be true, and he had found no case to the contrary, that if a testator in his will refers expressly to

Difference between a conveyance to uses and a will, in respect to the legality of reserving a power of future disposition.

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Every paper to which a will, duly attested, refers, if it comprise a disposition of *real* property, to be effectual as a testamentary paper, must either be incorporated originally into the will, or be executed according to the statute; and such paper, to be so incorporated must be distinctly referred to and

† *Sed quare et vide supra*. 332.

(i) *Smart v. Prujean*, 6 Vez. jun. 565.

described by such will.

Difference between a reference to a paper actually in existence at the time, and one intended to be written.

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any paper *already written*, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, such paper makes part of the will, whether executed or not; and by such reference he *does the same as if he had actually incorporated it. Because words of relation have a stronger operation than any other. But the difference between that case, and the relation to a future intention, is striking: in the former, said the judge, there is a precise intention at the time of making the will; for the paper makes out the intention at the time; but when a man declares he will, in some future paper, do something, he says, he will make a will as far as his intention is then known to himself, but he will take time to consider what he will do in future.

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With respect, however, to the copyhold estate, (123) mentioned to have been the subject of the dispositions in the *case above

An exposition of the grounds of construction as to the effect of the limitations in *Habergham v. Vincent*.

(123) As the second instrument was allowed to have an operation in respect to the copyholds, as a *codicil* to the will, it became necessary to consider of the proper construction of the limitations, and of the consequence arising from the expiration of the preceding estates before the limitation to the heirs of the surviving trustee could take effect. It may spare the student some trouble in exploring his way through the intricate passages, and amidst the multiplied objects presented to his view, in the very complex, yet, if well understood, most instructive case of *Habergham v. Vincent*, if I add in this note some exposition of the grounds on which the court determined in favour of the heir of the surviving trustee, in respect to the copyhold part of the testator's property. For this purpose, I shall recal his attention to the terms of the particular dispositions contained in the will of 1750, and the succeeding instrument, or the testamentary paper, which may, to our present purpose, (being now concerned only with the copyholds) be considered as a codicil sufficiently executed. The testator devised copyhold estates to five persons, by name, and the survivors and survivor of them, and the heirs of the survivor upon trust, upon the marriage or majority of his grand-daughter, to convey to her an estate for life, remainders to trustees to preserve contingent remainders, remainder to her first and other sons in tail-male, remainders to her daughters in tail-general, remainder to such person or persons, for such estate and estates, and subject and liable to such charges, provisions, and conditions, as he should by any deed or instrument, in writing, to be executed by him, and to be attested by two or more credible witnesses, direct, limit, and appoint, and to no other purpose. The will was duly executed and attested. By a codicil, dated the following day, the testator directed that his trustees

considered, it was held quite clear, by the Chancellor and Judges, upon the doctrine a little before stated, *that, as the deed poll was capable of being regarded as a testamentary paper, it was

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should, immediately after the death of his grand-daughter, and failure of her issue, convey all the said estate to the first son of Richard Hill, and his heirs male; then to the second and other sons of Richard Hill in tail-male; then to the daughters of Richard Hill, in tail-general; and in default of such issue, to the right heirs of the survivor of his trustees, his heirs and assigns forever. The testator died, and left Richard Hill, his son and heir at law, his grand-daughter, and all his trustees surviving. The grand-daughter married; but no conveyance of these estates was ever made; at her marriage, several of the trustees were living. She died soon after her marriage, and then two of her trustees were living. Her father, Richard Hill, survived her, and at his death only one trustee was living.

To comprehend the grounds of the determination in favour of the ultimate limitation in the codicil, four points require to be well understood. And first, we are to observe, that the court, in holding that limitation to be a contingent remainder, and not an executory devise, implicitly held that the will and codicil, by their mutual reference, became so connected, that the limitations proceeded throughout in a consecutive and uninterrupted series, the estates limited by the codicil being regarded not as independently created, but as linked into the chain, if I may so express myself, of the trusts originated by the will. But, secondly, as the remainder was contingent, was it destroyed by the expiration of the prior vested estates, before it could come into *esse*? Of this there could be no doubt, if the lands had been *freehold*, and the estate *legal* instead of *equitable*. It was surmised, however, that the freehold in the lord would support a contingent remainder of copyhold estate. But this ground was defeated by referring to the distinction in *Lane v. Pannel*, 1 Roll. 238, 317, 438, the doctrine of which case in this respect was confirmed by Chief Baron Gilbert, in his book on Tenures, p. 265-6-7, wherein it was established, that though the lord's estate will preserve a contingent remainder, so as to prevent the destruction of it by the tenant for life by the forfeiture or destruction of his own precedent estate, it will not support it, where the contingent remainder does not come in *esse* till after the precedent estate is expired by fluxion of time. The copyhold was, therefore, in no better predicament in this respect than if it had been freehold.

But then the case was open to a third consideration; for as being that of an *executory* trust, and *direction to convey*, the discretionary jurisdiction of the court seemed to attach upon it, which distinguished it from the case of an *executed* series of trusts, which must be governed by rules of strict analogy to the doctrine which governs the same estates at

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sufficient to pass the copyholds, and I apprehend it follows, from the principles of the reasoning just produced, that as a testamentary paper it must have operated as a *codicil*; for it could neither

law. If the conveyance had been made by the trustees, under the direction of a court of equity, on the marriage of the grand-daughter, which was the time it ought to have been made, in conformity to the will, there would have been no difficulty in giving effect to all the limitations in both instruments. They might have conveyed to the grand-daughter for life, then to trustees to preserve contingent remainders, remainder to her first and other sons, in tail-male; remainder to her daughters, in tail-general; remainder to herself, in tail-general, (to let in the daughters of her sons) then to trustees to preserve contingent remainders, (which was the estate wanted for the support of the contingent estates, limited by what we now call the *codicil*) then to the sons and daughters of the son, with the ultimate remainder to the heir of the surviving trustee (he being one of those who conveyed, and so the estate being passed out of him, and therefore capable of being limited to his right heir, in the form of a use, *vid. Hob. 30.*) But having omitted to make the conveyance then, they might still, upon the death of the grand-daughter, without issue, have conveyed first to the heir at law of the testator, and his heirs, (for to him would belong the trust undisposed of in the interim, until a son should be born to Richard Hill, then living) and then to that son. All the ulterior limitations would then be remainders; but the first to the first son of Richard Hill, a springing use. And after the death of Richard Hill, without issue, still there was no difficulty in conveying, so as to carry into effect the intention of the testator, for the true way then to execute the will, would be to limit the uses of the surrender to the heir of the testator, and his heirs, during the life of the trustee, with remainder to the heir of the trustee.

But if the case be considered as depending upon the limitation in trust, and the support of the legal estate left in the trustees, without resort being had to the particular consideration under which these *executory trusts*, directing conveyances to be made, come, in the courts of equity, a fourth point engages our attention. We are then to apply to the case the support afforded to it by the rule laid down in the Bishop of Cloyne v. Young, 2 Vez. 91, and many other cases, which have decided, that if there are trustees for any purpose, they are so throughout, unless it be expressly directed otherwise. In the case we are considering, Mr. Justice Buller took notice "that in *Hopkins v. Hopkins*, as reported in *Forrester*, it seemed as if Lord Talbot thought, that there was no difference between a contingent remainder of a trust, and a legal estate; but that the report was by no means accurate: nor was such an opinion given. The point was made in the argument, and Lord Talbot states it in this way: "It was said at the bar, that as

be incorporated into the will as an original part of it, or operate by virtue of the power affected to be reserved by the will.

We observe, that in the above-mentioned case of *Habergham v. Vincent*, (which is not yet exhausted) the counsel for the surviving trustee endeavoured to maintain the competency of the testator, by a will executed according to the statute, to reserve a power of future disposition of land by an instrument not perfected as the statute directs, by analogy to the case of a general charge of legacies on lands by a will duly executed, whereby it has been held,⁽¹⁾ that a testator enables himself to charge the land with any number of additional legacies, by a subsequent instrument not attested so as to pass lands. This, indeed, seems to be established doctrine with respect to legacies, which Lord Hardwicke said, was attended with no greater inconvenience than arose from a man's charging his lands by will with the payment

By a will duly executed, charging land generally with legacies, a testator enables himself to lay any number of additional legacies on the land, by a subsequent testamentary disposition unexecuted.

(1) *Vid. Masters v. Masters*, 1 P. Wms. 423; and *Brudenell v. Boughton*, 2 Atk. 274.

there are limitations of a trust, they will be good, though not to be looked upon as executory devises, but as contingent remainders; because the whole legal estate is in the trustee." "That was," said Mr. Justice Buller, "in 1734. In 1735, *Chapman v. Blisset*, (Farr. 145.) came before him, and then he first considered it, as it was in fact, an executory devise. Then he considered how it would stand, if a contingent remainder; and upon that point he declared, that even if it were so, yet being a *trust* estate, it would be good, and would not fail as it would if a *legal* estate. The opinion was extrajudicial, as it was an executory devise: but coupling what passed in those two years, it was a material authority: for it must be presumed, that after Lord Talbot had declined to give an opinion upon that point, in *Hopkins v. Hopkins*, he must have well considered it, before he delivered so clear an opinion upon it a year afterwards. After this, *Hopkins v. Hopkins* came on again before Lord Hardwicke, who gave a direct opinion upon the point; he said the ground upon which the common law went in making void contingent remainders, did not hold in the case of trusts; and the court has always considered the act of the tenant for life, where he could, in the case of a legal estate, bar the remainder, as a wrong, and made a distinction between a legal estate and a trust."

After the judges had left the court, the Lord Chancellor observed, that the report of the case of *Hopkins v. Hopkins*, in Atkyns, was grossly incorrect; and his Lordship offered to any gentleman at the bar, a note of that case, corrected by Lord Hardwicke himself.

* [845]

of his debts, which, doubtless, would extend to all the debts contracted during his life. It was insisted on the same side, that an equal victory over the statute might be obtained by this privilege of charging lands with legacies or debts to any extent by an unsolemn will, provided the land has been generally charged by a previous attested will, as was possible to be gained through the medium of this power of appointing, reserved "by a will; for, as to debts, it was said, that by a bond, creating a voluntary debt, a testator might circuitously dispose of the whole value of his estate; so, likewise, after having generally charged legacies upon his estate by an attested will, he might devise away the whole of his property by any testamentary paper, by creating a charge equal to its value.

Distinction between the case of subsequent legacies charging the land, by virtue of a former will charging them generally upon the land, and the reservation by will of a future power of disposition.

But a convincing reply to this reasoning was contained in the opinion of the Lord Chancellor, who put very pointedly the distinction between a will incomplete, by reason of the direct power of disposition affected to be acquired by special reservation, with an exemption from the requisites of the statute, and a general charging of the lands with legacies uncertain in their extent at the time, and which, when afterwards bequeathed, would not operate by virtue of a collateral power, but as determining the extent of what was already in potential existence. His Lordship said, "that it was supposed to be Sir Joseph Jekyll's opinion in *Masters v. Masters*, that it might be supported as a power, reserved to the testator, to increase the charge by a future act. That could not be the ground of his opinion. There was a manifest incongruity in the supposition of a power, reserved by a man's own will, which cannot begin to operate till all power in him ceases. The observation made by Mr. Justice Wilson was unanswerable, that it is not a personal privilege; and that no man can reserve a power to act against the forms which the law has imposed. Therefore, if it were to pass by a testamentary act, such act must have all the requisite solemnities the law has directed. But in a correct M. S. note in his Lordship's possession, Lord Hardwicke had stated the ground to be the analogy to the case of debts; which was the ground of the determination.—His Lordship added, that the cases to which he had alluded, were none of them cases of a primary, substantive, independent charge upon the real estate, but a charge upon it in aid of the personal, which was *primarily* charged. Such a charge, whe-

ther for debts or legacies, was necessarily uncertain in extent ; not merely because the testator could not ascertain what might be "the amount of his future engagements, but because the amount of the personal estate was fluctuating." * [346]

" A charge for legacies, therefore, his Lordship said, must be uncertain as to its extent ; not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating. Whatever affects the primary fund, varies the amount of the charge. Therefore, though given by a will duly executed, they are revocable by a will not so executed ; for the charge upon the land was only for the deficiency of the personal to answer the legacies. If the legacies were taken away, the land would not be affected. If they were increased, they would affect the real by diminishing the personal, which it was in the power of the owner to do all his life. That it was obvious, therefore, from that reasoning, that the statute of frauds did not affect the question as to legacies, because it did not prevent a man from creating by will, a fluctuating charge upon real in aid of personal property. But that, said his Lordship, could bear no application to a devise of the land itself, or a reserved part of the real not disposed of, nor, as he conceived, to an original charge upon the land ; which he should think could not be revoked by a second informal will. If ever such a case arose, it would be a new question."

In *Brudenell v. Boughton*,⁽¹⁾ so often referred to in the above case of *Habergham v. Vincent*, the doctrine in regard to legacies generally charged upon land by a first will, duly executed, and increased, diminished, revoked, or modified by a subsequent will not so executed, appears in its greatest expansion, and with much lucid explanation from Lord Chancellor Hardwicke ; from whom we clearly collect the following distinctions upon the subject. If a sum of money be given *originally and primarily* out of the land, such a devise requires as much the solemnities of execution prescribed by "the statute, as a devise of the land itself ; because the money is regarded in a court of equity as *part of the land*, since it can only be raised by sale or disposition of part of the land, and this is considered as analogous to the rule of law, that a devise of the rents and profits is a devise of the land itself.

A sum of money devised out of land is part of the land in equity, and such disposition is within the statute.

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(1) 2 Atk. 267.

And if money be so charged upon land by a will with the due solemnities, a subsequent will unattested or attested by one or two witnesses only, cannot revoke or subtract the charge. But where land is generally made subject to legacies, such legacies are nevertheless to be considered as primarily attaching upon the personal estate, so that if there are personal assets sufficient, the land will be exempt, for it is only a collateral security; and by a consequence in reasoning, if the will be revoked as to the personal, the object of the collateral security is gone, and the land remains no longer charged. The legacies given by the first will may be withdrawn by a second, unexecuted according to the statute; and by such second will, new legacies may be substituted of a different amount; or, without changing or modifying the legacies first given, additional ones may be given either to the same or different persons.^(m)

A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property, as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil.

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To effect this absolute conversion, a clear intention ought to be demonstrated.

A circumstance principally to be attended to in considering the subject of these cases, is, that by the first will executed to pass and affect real property according to the requisitions of the statute, the land is effectually made an auxiliary and collateral fund to the personal property in respect of legacies: to this indefinite extent it becomes a pledge, and impressed with the character of personal estate. But it is to be observed, that if a will properly attested, contains a direction to sell real estates, and out of the produce to pay legacies, such direction does not so stamp this character of personal estate upon the *whole*, or operate so complete and *ultimate* a conversion of the land into personalty, as that the surplus, after the legacies are satisfied, may pass by an unattested codicil. To produce this effect, the testator ought, in a will executed and attested *so as to pass freehold estate, to manifest a clear intention to have the whole actually sold, or at least, should in such will decidedly show that he contemplates the surplus as personal estate, and intends to bring the *whole* within that description of property. To this limit the cases cited in *Sheddon v. Goodrich*,⁽ⁿ⁾ seem to have carried and confirmed the doctrine. What is not *absolutely* converted either in law or equity, but is only directed to be sold to answer a particular purpose, as to pay legacies, for which the testator has directed certain conveyances to be made, retains, as to the surplus, its character of

(m) Vid. *Hannis v. Packer*, Ambl. 556.

(n) 8 Vez. jun. 481; and see *Ripley v. Waterworth*, 7 Vez. jun. 425.

real estate. For the particular purpose to which the produce is destined, this conversion into personal estate may take place, but as between the personal and real representatives it remains real. It is upon this principle, I humbly conceive; that if the object for which the conversion was to be made, does not come into existence, and thus no reason arises for any conversion to answer the purposes of the will, the estate *descends*, in the view of a court of equity, *as real*, to the heir at law. This being, as I apprehend it will appear from the cases to be, the doctrine on this delicate subject in a court of equity, it follows, that if, after directing an estate to be sold for the payment of *particular* legacies by a will duly executed and attested; the testator might, by an unattested codicil, dispose of the surplus of his property, either the consistency of the courts of equity, which to other purposes have considered such surplus as real, or the positive restrictions of the legislature, would be violated: If, therefore, an estate were directed to be sold, and all the debts and legacies generally to be paid out of the produce, it seems clear that this would amount only to that sort of general charge which has been so much above considered; and, though pecuniary legacies generally given by an unattested codicil would, it should seem, according to the above principles, attach as charges *secondarily* upon the land, yet the surplus could not *eo nomine* be disposed of by such unsolemn instrument.

* But if a testator, by a will duly executed to pass lands, directs the whole of his *real* and *personal* estate to be sold, and out of the produce thereof certain legacies to be paid, and then by an unattested codicil in terms revokes his will, which revocation, from the want of solemnity, can only operate upon the previous dispositions of the personal estate, a very nice and curious question may arise, whether the legacies are to be considered as gone by the partial failure of the fund, or as remaining charged on the real estate. In the above cited case of *Shedden v. Goodrich*, this was one of the points, and one on which the present Chancellor expressed a painful degree of difficulty and doubt. I will endeavour to compress in a few words what appears to me to be the *substance* of the distinction propounded at large by his Lordship. Where a testator, in general terms, subjects his real estate to his general legacies, or charges his legacies generally upon his real and personal property, inasmuch as

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Where a testator shows both the *real* and *personal* estate to be equally in his contemplation, as the funds out of which the legacies are to be satisfied, a revocation effectual as to the personality, but insufficient as to the real for want of being attested according to the statute, will

leave the land still subject to the charge.

the primary and direct source from which the legacies are to come, will be the *personal* estate, the land being regarded in equity as only *secondarily* and *eventually* charged as a collateral security to the personal estate, if the principal fund is afterwards withdrawn, the rule of *accessorium sequitur principale* seems to apply; and as the land was charged only to help the deficiency of the personal, this latter fund being *radically withdrawn*, and not failing through *insufficiency*, the testator must be presumed in law to have altered his will as to the legacies. But where a testator shows an intention to bring the real and personal estates into one fund, by directing a sale of both, and the legacies to be paid out of the produce, he seems to have both funds *equally* in contemplation, and not, as in the other case, (according to the construction the law puts upon the intention) to mean primarily and originally a mere personal gift, to be assisted out of the real property if the personal fails. The distinction runs into great subtlety, but is there any distinction *less* subtle that will reconcile the authorities?

The court cannot see the intention of the testator with respect to his real property, unless he expresses it by a will, executed according to the statute.

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It seems that the effect of the statute is to prevent the court from seeing the intention of the testator to dispose of "the real estate," (124) if, in truth, he has not done it with the solemnities enjoined by the statute; for in *Sheddon v. Goodrich*, the codicil declared an intention to make a new disposition of the real as well as the personal; but as it could only have the effect, for want of execution, of revoking the charge of the personal, the land was construed, notwithstanding the contrary intention expressed, to remain *onerated*, upon the principle of the distinction above attempted to be stated, between the case where legacies are charged upon a mixed fund, and where they are wholly issuable out of the personal in the first place, the real being meant only to come in aid as a supplemental and second-

(124) Thus in *Buckeridge v. Ingram*, 2 Vez. jun. 652, the Master of the Rolls (the late Lord Alvanley) observed, "that he *could not read the will* without the word '*real*' in it; but he *could say*, for the statute enabled him, and he was bound to say, that if a man, by a will unattested, gives both real and personal estate, *he never meant to give the real at all.*" In *Sheddon v. Goodrich*, the present Chancellor noticed the accuracy with which Lord Alvanley expressed himself as to that point.

dary resource. And this a testator will be construed to mean, unless he plainly expresses or indicates a contrary intention.(o)

In the case, however, of *Buckeridge v. Ingram*, (p) where a testator, by a will duly executed, gave an annuity to his daughter, charged on all his estates, both real and personal, and by codicil not attested, gave his real and personal estate to his mother for life, the personal estate only was held by this new disposition to be discharged from the annuity, or, in other words, the annuity was revoked as to the personal estate, but remained a charge upon the real; and the present Chancellor seems to have approved of that judgment;(q) who says that "Lord Alvanley, as he understood upon conversing with *him, proceeded upon this, that it was not the case of a legacy given, as in *Brudenell v. Boughton*, and that legacy altered, modified, or extinguished by a subsequent testamentary paper; but a charge created upon two funds; and the testator, by a subsequent paper, withdrew, not the gift of the thing, but one of the funds, which by the former paper was made liable to the payment of that charge, still leaving a subsisting demand; for, being given out of the real as well as the personal estate, the gift out of the real remained, though that out of the personal was gone; not because the thing given was destroyed, but the fund out of which it was given." If the presumption of adding any thing to his Lordship's remarks on the point in *Buckeridge v. Ingram*, may be excused, it might be suggested, that the *power of distress* accompanying the annuity in that case, seemed to mark the real property as an *original* fund in the testator's contemplation for producing the annuity.

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In the early case of *Hyde v. Hyde*,(r) which appears to have been the first case upon this subject, Lord Chancellor Cowper observed, that these legacies charged upon land by an unattested codicil, were not devised *out* of the land like rent, but were, only secured by land, which before was well devised. And the same Chancellor clearly held, that a rent out of freehold would not pass but by a will attested by three witnesses. So Mr. Justice Buller(s) put the case as to rents strongly thus, "It is clear upon the statute, that a rent cannot pass without

Devise of a rent out of land must be by will, attested by three witnesses.

(o) Vide *Ancaster v. Mayer*, 1 Bro. C. R. 434. *et supra*, 73, 74. (p) 2 Vez. jun. 652. (q) 8 Vez. 500. (r) 1 Eq. Abr. 409. (s) 2 Vez. jun. 232.

three witnesses; for the statute says, '*lands and tenements*,' and a rent is a tenement; and if a tenement could pass without witnesses, it would be in direct opposition to the act." Whatever comes properly within the description of a tenement, or to use the words of the Master of the Rolls in *Buckeridge v. Ingram*,^(t) wherever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with, or, as it is emphatically expressed by "Lord Coke, exercisable within it, it is that sort of property which the law denominates real, and cannot pass without three witnesses." It seems not to be doubted, therefore, but that tolls,^(u) where they are not for terms of years only, navigation shares,^(x) commons, the profits of a stallage, petty customs,^(y) market, fair, or piscary, which are the subjects of dower,^(z) are within the clauses respecting the execution and revocation of wills. But in *Stafford v. Buckley*,^(a) Lord Hardwicke held an annuity in fee, granted out of the 4 1-2 *per cent* duties, upon goods exported from the West-Indies, to be a *personal* hereditament; and in *Lady Holderness v. the Marquis of Carmarthen*,^(b) it was held by Lord Thurlow, that an annuity charged upon the post-office, till a sum to be laid out in land should be paid, was a personal annuity; and the inference is, that such property may be passed by a will not attested by three witnesses.

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Same doctrine as to tolls, navigation shares, commons, profits of a stallage, petty customs, market, fair, piscary.

Charitable uses are within the statute of frauds.

Between the statute 29 Charles the Second, c. 3. and the statute of 9 George the Second, c. 36. when the stat. 43 Eliz. c. 4. called the Statute of Charitable Uses, was in force as to wills, it was sometimes a question, whether a devise to a charity, or charitable uses of real estate, unattested by three witnesses, and therefore void under that statute, could yet operate as an appointment under the statute of Elizabeth. Thus, in the *Attorney-General v. Barnes et Ux.*^(c) the Attorney-General, at the relation of Sidney College, Cambridge, set forth, that one Dr. Johnson, a member of that College, by will in writing, devised his land to the College to maintain two scholars, to augment vicarages, to buy presentations, and to maintain widows;

(t) 2 Vez. jun. 663—4. (u) 2 Blackst. Com. 20. (x) *Drybutter v. Bartholomew*, 2 P. Wms. 127. *Buckeridge v. Ingram*, 2 Vez. jun. 652. (y) *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. *Negus v. Coulter*, Amb. 367. (z) Co. Litt. 19, 20. *supra* 127. (a) 2 Vez. 170. (b) 1 Bro. C. R. 377. (c) 2 Vern. 597.

to which will there was no witness ; and the great question was, whether admitting it to be void as a will, it could be good as an appointment. Lord Keeper *Somers took time to consider, and afterwards adjudged that the testator intended to dispose by will, and that being void as a will, it could not operate as an appointment. But in Griffith Flood's case, which was on an analogous question in respect to the statute of wills, a different opinion was entertained by Lord Hobart and the then Chief Baron, upon a reference to them from the court of wards ; which case was shortly thus : G. F. Doctor of Law, being seised of lands in fee, in 1571, devised the same to his wife for her life, and afterwards to Jane, his daughter, for her life, and after those lives ended, to the principal, fellows, and scholars of Jesus College, Oxford, and their successors, to find a scholar of his blood from time to time, and died. The lives ended, and B. L. heir of the testator, being the King's ward, entered ; and, upon a case made by the Court of Wards, and by order of the court, brought to Lord Hobart and the Chief Baron, they resolved that the devise was void in law, because the statute of wills did not allow devises to corporations in Mortmain. But yet, they clearly held it to be within the statute 43 El. of charitable uses, under the words of that statute '*limited and appointed,*' and accordingly it was adjudged, that the College should enjoy the land against the ward and his heirs.(d) Collison's case,(e) determined about the same time, was to the same effect.

As there was an exception out of the statute of wills of devises in mortmain to corporations, it should seem that these dispositions of land are left by that statute in their original state of disability. The 43d Elizabeth, gives efficacy to appointments to charitable uses, and for the benefit of the universities ; and I have never been able to conceive how this enabling act can be construed to operate as a repeal, as to charitable uses, of the former statute of the 32d of Henry the Eighth : it only gives a power, which never had before *existed,(125) and which the statute of

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(d) Hob. 136.

(e) Id. *ibid.*

(125) By the civil, and more particularly by the canon law, certain preferences and indulgences were allowed to the testaments *ad pias causas* ; but it does not appear that our law makes any distinction in favour of a will for the benefit of a charity. Thus, if a devise be made

Henry had denied. It was without difficulty determined by Lord Hobart, that the devise to a charitable use was void ; not void *by* the statute of wills, but void, as that great judge expresses himself, "*at law*, because the statute of wills did not allow devises to corporations in mortmain." But he held, with equal clearness, that it fell within the enabling provision of the statute of charitable uses, under the words *limited and appointed*, contained in that statute. The truth is, therefore, that under that last-mentioned act, a devise to a charity was considered as operating, not as a will, but as an appointment, and, therefore, seems wholly independent of the act of Henry the Eighth. The danger of parol and nuncupative dispositions of land, after the 43 Elizabeth had broke through the barrier in favour of alienations to charitable uses, seems to have induced the judges to hold, that a testament giving land to a charitable corporation, was not good, unless in writing according to the exigency of the statute of wills, notwithstanding such devises were, as *before said, excepted out of that statute, and validated by the statute of Elizabeth, not as testamentary dispositions, but as privileged conveyances under the special authority of that law. In the case of *Jenner v. Harper*,^(f) this point received the judgment of the court of chancery ; which was shortly as follows :

Jenner made his will in writing some time in the year 1651, and afterwards on the 5th of December, in the same year, added a codicil in writing, and the same day another nuncupative codi-

(f) Prec. in Ch. 389.

to A and his heirs, and if A die without heirs, to a charity, such devise over is void ; as it would be in the case of common persons ; and no favourable construction will take place to give effect to such devise over ; such as would be made, if it were to a person related in blood so as to be capable of becoming the heir at law, from an implication of intention founded upon the impossibility that the first devisee should die without heir, while the ulterior devisee was living, by restricting the sense of the word heirs, to heirs of the body. *Cro. Car.* 57, the *Attorney-General v. Gill*, 2 P. Wms. 368. And on a deficiency of assets, legacies to a charity will abate in proportion to others. The *Attorney-General v. Hudson*, 1 P. Wms. 674, and *Masters v. Masters*, 1 P. Wms. 422. But nevertheless, our courts of law or equity will not enjoin the spiritual court from proceeding in legatory matters, according to the civil law. *Fielding v. Bond*, 1 Vern. 230.

cil, (upon which the present question arose) and thereby devised, out of his lands and estate in such a place, 20*l. per annum*, for the erection of a school and maintenance of the schoolmaster, forever ; this nuncupative schedule was, *after his death*, put into writing, and proved as such by three witnesses ; the school was built, and a schoolmaster put in and continued for several years, by the executors of Jenner's will ; but afterwards the heir at law refusing to continue the payment, no school had been there kept for about thirty years past. Sometime afterwards a commission of charitable uses was taken out, and the commissioners decreed the devise good, and the heir at law to pay 20*l. per annum*, according to the nuncupative schedule ; and now, upon exceptions to that decree, the question was, whether this were a good devise.

It was urged for the charity, that this, though it were only a parol devise, was a good *appointment* within the 43 Eliz. and that that act made no difference between an appointment by parol, and an appointment by writing ; and that this being made before the statute of frauds and perjuries, though it were only by parol, and so not good within 32 H. 8, was yet a good appointment within the 43 Eliz. which, being subsequent in time, had repealed the former statute as to this ; and that a devise by tenant in tail to a charity, though not good against the issue upon the statute *de donis*, yet had been several times held good against him as an *appointment* by the 43^d Eliz. which had abrogated that act as to such charitable devises.

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But on the other side it was urged, that these devises to charitable, as well as other devises, must be governed by some rules : that by the civil law, if a man devised a charity out of his personal estate, and legacies thereof likewise to others, and the personal estate fell short to answer all, the charity should be preferred : but in this court, that rule would not hold, but the charity must abate in proportion to the rest ; that since the statute of frauds, if a man by his will gives lands to a charity, yet if that will be carried but imperfectly into execution, and so is not good as a will, it had been held not to be good as an *appointment* ; so was Dr. Johnson's case, where there were but two witnesses to the will. Indeed, if a man should make a writing on purpose to found a charity, it might have another construction ; but when he makes a will, and intends it to other purposes, though he does thereby appoint a charity, yet if the will be defective as a will, it

shall not operate as an appointment to support a charity: this it was a long time doubted, whether a will in writing, though good in all circumstances, should operate as an appointment against the issue in tail, (126) and if that was so much doubted, to support a nuncupative devise out of lands to a charity, would be carrying it still much farther.

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The counsel mentioned a case in Swinb. 28; where a man sent for a scrivener to make his will, and directed him to give his land to such a one, and his heirs upon condition; the scrivener wrote the devise, but before he had written the condition, the testator died, and this was adjudged a void will; for an absolute devise it could not be, because the testator did not intend it so; and a condition devised it could not be, because the condition was added after the man's death; that the reason a devise by tenant in tail to charitable use shall be good against the issue, is, because the testator had it in his power, by fine, to have barred the issue; and though he did not live to perform that ceremony, yet as a will, being perfect and complete, by the aid of the 43 Eliz. it might work as an appointment, for that at common law there were no fines, nor recoveries, nor estates tail, and, therefore, that statute was a restoring of the common law: so a deed of bargain and sale to charitable uses, though not good by 27 H. 8, for want of enrolment, yet by the other act it would be good as an appointment, for that restores the common law; but no resolution has ever gone so far as to support a parol devise to a charity out of lands, because, being defective as a will, which was the manner of conveyance, he intended to pass it by, it can have no effect as an appointment, which he did not intend. And of this opinion the Lord Chancellor seemed to be, but took time to consider of it, and afterwards held, that it was not good as an appointment.

In conformity with the principle of this last determination, and agreeably to the case a little before mentioned as having been determined on the subject by Lord Keeper Somers, it has been clearly settled, that charitable uses fall entirely within restrictions and requisitions of the statute of frauds. Thus in the case of Ad-

. (126) The stat 43 Eliz. c. 4, supplied the defects of assurances where the donor was of a capacity to dispose, and had such an estate as was alienable. Vid. Duke, page 84.

dlington v. Cann and Andrews,(127) it was clearly held by Lord Hardwicke, that there must be a will duly executed to create a charitable use, and that the court will not set up a trust for a charity without a declaration in writing. The object of the plaintiff in that case, who was *the heir at law of the testator, was to discover a secret trust, or to set up a paper as a devise to a charitable purpose, in order to bring it within the statute of Mortmain, 9 Geo. 2, c. 36, whereby it is enacted, that "no manors, lands, tenements, rents, advowsons, &c. nor sums of money, goods, &c. or any other personal estate whatsoever, to be laid out or disposed of in the purchase of lands, &c. shall be given, granted, &c. or any way charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, &c. be by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, and be enrolled in the court of chancery, within six calendar months after the execution thereof, &c. (except stock in the public funds, which may be transferred within six months previous to the donor's death) and unless such gift be made to take effect in possession immediately from the making thereof, and be without power of revocation, trust, condition, limitation, or agreement whatever, for the benefit of the donor, or any claiming under him."

The Chancellor considered charitable uses as well within the clause of devises, as the clause relating to the declaration of trusts. He said, "it had been determined, that there must be a declaration of trust in writing, and that there must be a will duly executed, in order to create a charitable use; and even though such appointments had got the better of the statute *de donis* and copyhold estate, that it was not a good appointment to pass freehold land to a charitable use within this statute. That it had been determined by Lord Talbot, in the case of the Attorney-General v. Spillet,(g) that the court would not set up a trust for a charity

(g) 3 P. Wms. 344. 2 Atk. 148.

(127) 3 Atk. 141. It was taken for granted by the counsel for the defendants in this case, that the King was not bound by the statute of frauds. Vid. 1 Salk. 162, The King v. Lady Portington.

- * [359] without a declaration in writing, notwithstanding there were such circumstances in favour of the charity, that the testator could not mean any thing else. That he was of opinion, that the statute of mortmain had not abrogated the statute of frauds, which "being made for the public good, ought *normam imponere futuris*. That it was true the statute of frauds could not govern the *particular provisions* of that statute, but it must govern the *construction* of subsequent acts, which must be construed by the rules of law, and by what is laid down in precedent acts. If it should be admitted, that the statute of mortmain took all those cases out of the statute of frauds, and was intended to introduce parol evidence, it would do more mischief by laying the foundation of a great deal of perjury, than it could possibly do good in any other respect whatsoever. It ought, therefore, to be construed conformably to the statute of frauds and perjuries."†

Terms attendant upon the inheritance are within the statute.

- Terms of years will pass‡ by a will unattested, but terms attendant on the inheritance, are, as to the equitable interest in them, within the statute, though the legal estate is exempt from its operation. The case of *Whitechurch v. Whitechurch*,^(h) will explain this point. Edward Whitechurch took a mortgage of Batcomb Lodge, from one Bisse, for 500 years, to commence from the making, for securing the sum of 200*l.* and interest, and afterwards took another security of the same lands from Bisse, the mortgagor, for 1000 years, in the name of another person, but in trust for himself, to commence also from the making. After this, Edward Whitechurch purchased the inheritance of the premises in his own name; and having no wife or issue male, "made his will all of his own hand-writing, whereby he devised the premises to his nephew, being the son of his younger brother, Joseph

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(h) 2 P. Wms. 236.

† So that a declaration of a trust of real estate for a charity, must now be in writing, and an appointment for such object, if it is not to operate till after the death of the party, and respects real property, must be attested by three witnesses according to the statute 29 Car. 2, although the statute 9 Geo. 2, prescribes only two; for such deed of appointment is testamentary, and regards land, and that is enough to bring it within the statute, whatever may be its form.

‡ But they cannot be *created* but by a will attested, because the *creation* of a term affects the *real estate*.

Whitechurch, for his life, remainder to his son, Edward Whitechurch, and to the heirs male of his body forever, and made his brother, Joseph Whitechurch, his executor and residuary legatee.

It happened that this will, (though intended to be perfected as such) by reason of the testator's sudden death, had neither a date or name subscribed thereto, nor was the same attested, but the executor proved the same in the spiritual court, and assented to the devise to the nephew: whereupon the elder brother's daughter, who was heir to the testator, brought the bill, in order to compel the executor and the devisee to assign over the term to her.

It was objected for the defendants, that the executor had assented to the devise, and that the will, though not attested by three witnesses, was, however, good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion, and not as a grant of a future interest,⁽ⁱ⁾ (for it was admitted, that a future interest would not prevent a merger) but this grant of 1000 years, being to commence from the making, did pass the reversion for 1000 years; which was acceded to by the court.

Then if this will would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose in disappointment of the will, especially when it was in favour of so near a relation as a nephew of the testator, and one of his own name, and all this for the sake of one not more nearly related; of one who, on her marriage, would probably change her name. It was furthermore added, that in all cases between volunteers, (as the heir and devisee were here) he that had the law on his side used to prevail.

*But it was decreed by the Master of the Rolls, that as this was a term which would have attended the inheritance, and in equity have gone to the heir and not to the executor, in which respect, it was to be considered as part of the inheritance, so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term: that though it was true, such a will as in the present case would be

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(i) Vide supra, 2d part of Chap. 4.

sufficient to pass a term in gross, yet it should not pass a trust of a term attendant on an inheritance. That a will not attested as the statute of frauds requires, should not pass any estate of which the heir, as *heir*, would otherwise have had the benefit. That if the devisee of the land had brought a bill against the executor and heir, to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee; and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper. Besides, the court observed, that it was the intention of the testator in the present case, not to pass the term *only*, but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first and other sons in tail. Though as to this, it was said to be extremely hard, that because quite so much as was intended could not pass, therefore, the devisee should be deprived of that which might lawfully pass, and which was a less estate than was intended him, or because *all* could not pass, therefore nothing should. However, for the above reasons, the court decreed the devisee and executor to join in assigning the term to the plaintiff, the testator's heir at law, but no costs on either side; this decree was afterwards affirmed on an appeal by the Lords Commissioners, Gilbert and Raymond.

When this cause was reconsidered on the appeal before the Lords Commissioners, Gilbert and Raymond, (k) Gilbert, Baron, was of opinion, that this was a term attending the inheritance, *and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trust to attend the inheritance, and that it would be very dangerous to all the inheritances in England, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such. Now, in the principal case, if this should be construed as a term in gross, then it was such a chattel interest as might pass by the will, though all the solemnities required by the statute were not observed; but if it was a term annexed unto, and attending the inheritance, it could not pass by this will in any other manner than the inheritance would pass. That it had been allowed at the bar, that the term for two thou-

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said years was annexed to the inheritance, but it was said, that the term for five hundred years was not ; but no reason was given why there should be such a difference between these two terms, that one should, and the other should not attend the inheritance : and certainly it could never be said with any colour of reason, that, where a mortgagee of a term of years purchased the inheritance, that such term, when in himself and unmerged, should go and descend in a course different from the inheritance ; for it was the constant and uniform construction in that court, that such a term shall be annexed unto, and protect the inheritance, and attend the same ; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person. (1)

But Lord Commissioner Raymond differed from Baron Gilbert, in the view which he took of this doctrine. He was of opinion, that where a term comes to an executor, by implication, as a chattel interest, or to a devisee by a general devise of all his chattels ; or where it vests in an administrator, generally, without making any will ; in such cases, the heir at law would be competent to apply to this court to have the term assigned to another, to attend and protect the inheritance ; but that, since it was agreed on all hands that the term passed at law, it was a question, whether that court could *take it from him to whom it was devised in favour of the heir at law, who was a volunteer as well as the devisee ?

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That it was true, where a term was *expressly limited to attend the inheritance*, there, though the testator likewise *expressly* devised it to another, it would not pass ; but where it attended the inheritance only by construction or operation of law, or in an equitable notion, as a term brought in and assigned by creditors, or terms raised for children's portions, or for other particular purposes ; there, if the testator *expressly* devised such terms, they would pass. For where a man had a term for years, which by intendment of law only attended the inheritance, certainly he had a power to sever such a term from the inheritance ; and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but it became a term in gross ; and why should not a man have

(1) Et vide Villiers v. Villiers, 2 Atk. 71.

the, like, power to do the same thing by will, if he thought fit? But that as in that will there was no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there were sufficient words to pass it in general, it was to be considered, whether such *general* words should, after the death of the testator, sever that term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

Comments
on the doc-
trine laid
down by Ld.
Commissioner Raym.
in White-
church v.
White-
church.

The distinctions taken by Lord Commissioner Raymond may be more readily understood, by being stated as follows: a term of years may have become attendant upon the inheritance after all the express purposes of its creation are satisfied, by consequence and operation of law, or, after such satisfaction, it may have expressly received this ulterior destination by actual assignment for this purpose. If a term be in the predicament first above supposed, and a person, having in himself such term unmerged, by reason of an intervening reversionary term outstanding, or by reason of the legal estate in the inheritance being in another for his benefit, *expressly* devises the term by a will capable only of passing *chattel* interest, the term will be severed from its *accidental* connexion with the freehold, *and will go to the devisee as a beneficial interest, or, in other words, will pass in equity as well as at law. But if it be not so *expressly* devised, the heir at law will be entitled beneficially to the term for the protection of the inheritance, or, in other words, the equity in the term will descend as *a part* of the inheritance for want of a sufficient execution of the will to pass freehold estates.

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But supposing such satisfied term to have once received an express destination to attend upon the inheritance, then it seemed to the Lord Commissioner to be immaterial whether it was *expressly*, or *by name* devised by the testator, or included under a *general devise of his chattels*, or suffered to devolve to the executor or administrator; it being that judge's opinion, that where such *express* limitation had taken place, it would not pass by a will unattested, though the testator *expressly* devised it to another.

The whole of this doctrine of the Lord Commissioner, who delivered his opinion to the effect last above-mentioned, turned upon a distinction between a term assigned upon an *express declaration of trust*, to attend the inheritance, and a term *construc-*

tiorly so attendant by implication and operation of equity. But the case of *Willoughby v. Willoughby*,^(m) has clearly negatived any such distinction between estates expressly made attendant upon the inheritance, and become so by construction of equity : in which case it was also laid down by Lord Hardwicke, that the term, in *whatever* manner it may have become attendant, may be *disannexed* and turned into a term in gross at any time, by the owner of the inheritance.

A will must operate upon the testator's property according to the predicament it is found in at his death ; therefore, though perhaps, as I have before taken occasion to observe in *the second part of the fourth chapter*,⁽ⁿ⁾ on contracts, a thing annexed to the land, if contemplated as severed therefrom, and so converted in the view of the parties into a separated chattel, is not within the fourth clause of the fourth section of this statute ; yet, unless an actual severance has taken place in the life-time of the testator, he is incapable by his will, unattested, of *devising* these appendages of the freehold, in separation from the subject to which they adhere. And, therefore, according to Perkins, title *Devises*, from whom Swinburn^(o) has copied the doctrine ; these things, which after the death descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in such cases where it is lawful to devise lands, tenements, or hereditaments. So the law stood before the statute of frauds, and so, I apprehend, it remains, in relation to the new requisites to a devise of freeholds introduced by that statute.

It appears, therefore, to be safe upon analogy to old principles, to hold, that if a man seized in fee of lands bequeath, by will sufficient only to carry personal estate, all his trees growing upon his land at the time of his death, such devise is void. But if he devise away from his heir the corn growing upon the same land at the time of his death, such devise will be good by a will unattested. The trees are parcel of the freehold till actually severed, and unless devised away by a will applicable to freehold, descend, together with the land, to the heir ; but the corn which was sown by the testator, shall go to the executor, as part of his personal goods ;^(p) unless there be an express devise of the lands themselves, in which case, though no mention is made of the

As to wills affecting things affixed to or growing upon the freehold.

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(m) 1 T. R. 763. (n) Page 126. (o) Part 3, sect. 6. (p) *Fisher v. Forbes*, 2 Eq. Ca. Abr. 392.

corn, the law holds that the intention of the testator was to pass the land, together with its fruits, and the devise shall take effect against the executor. (g) A testator may, therefore, bequeath his standing corn, sown by himself, to whom he pleases, by an *unattested* will.

Thus it has always been held, that if a man be seised of land in right of his wife, and sow the land, and devise the corn growing thereon, and die before the corn be reaped, the legatee shall have the corn, and not the wife. The reason of the law in which particular is, that the corn is *fructus industrialis*, and he who sows it, has a kind of property in it, divided from the land, gained by the *very act of sowing it*. (r) But if one joint-tenant sows the land, and dies before it is reaped, the corn survives with the land, (128) because he gained no exclusive property by the act of sowing it, for he had no exclusive property in the land. But if A, seised of land, sow it with corn, and then convey it to B for life, remainder to C for life, and then B die before the corn is reaped, C shall have it, and not the executors of B, though his estate was uncertain, for the reason of industry and charge. And if B and C both die, then the lessor who sowed the corn shall have it. (129) But the law is otherwise in respect to trees, and also the grass and herbage, not separated from the ground at the time of the death of the testator, for this is not *fructus industrialis*, and, therefore, as a tenant for life, cannot, by a will properly executed to pass freehold estate, make any disposition thereof to operate after his death, so neither can the owner of the land in fee-simple pass it in separation from the land by a will executed only to pass chattel and personal property.

(g) Winch, 51. Cro. El. 61, 461. Roll. Abr. 727. (r) Hob. 132.

(128) Cro. El. 61. Dyer, 316. a. But if one of the joint-tenants occupies the land alone, by the consent of the other, and takes the profits alone to his own use, it seems that if he sows the land, he may devise the standing corn away from the survivor, as *fructus industrialis*, and such devise will be good since the statute of frauds, without witnesses; for it is said, that such assent to his sole occupation of the land amounts to a lease at will, and as such, gives a title to emblements; but such assent by the companion must be express and positive. Cro. El. 514.

(129) Cro. El. 61. For the doctrine as to emblements, see Perk. sect. 530. Co. Litt. 41, 45. Com. Dig. tit. Biens, G. 1. c. 2.

With respect to *heir-looms* which by custom have gone with a house, they cannot be devised separately by the owner of the *fee-simple*, even by a will executed to pass *freehold estates*, for the will does not take effect till after the death of the testator, and by his death the heir-looms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise. (e)

Things which belong to the realty by simple annexation to the freehold, may not be devised away by a will *unattested*, unless they were separated before the death of the testator, for they are as much freehold as the land itself, until such separation takes place; and of this description are doors, windows, and even furnaces and ovens, and tables and benches, if fixed and mortised in the earth, and so in general all those appendages of the freehold, which a tenant cannot remove or destroy, without being liable to punishment for waste. (f)

We have seen, a little above, in the case of attendant terms, an example of an interest in land, devisable at law by a will not executed and attested according to the statute, but from the particular view taken thereof in courts of equity, deemed by those tribunals to be as much the objects of the requisitions of the statute as estates of inheritance. The converse of this doctrine holds in respect to *mortgages*; this interest being regarded in courts of equity as entirely *personal*, a will *unattested* seems clearly to be capable of passing the beneficial right of the land, so that the devisee under such a will of the land mortgaged, would be permitted by the court to use the name of the heir to compel payment of the money, or *make the pledged estate his own by foreclosure. In the third part of the preceding chapter, an attempt was made to exhibit the true consideration under which a mortgage comes into a court of equity, by recurring to which, the principle upon which this exemption in equity of this description of property stands, will readily present itself. It was there shown, that in equitable contemplation the estate in the land remains in the mortgagor, while, in respect to the interest of the mortgagee, the land takes the character of personality, as following the nature of the debt, to which it is a collateral security; insomuch that if a mortgagee, after mak-

Heir-looms.

Mortgages in equitable consideration are not within the clauses respecting wills in the statute of frauds.

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(e) 1 Inst. 185. b. 3 Atk. 12.

(f) 4 Rep. 64. et vid. Lawton v. Lawton,

ing his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively, under the general words lands, tenements, and hereditaments, contained in the will, but will go as an acquisition, or purchase subsequent to the will, to the testator's heir at law.^(u)

In the consideration of equity, therefore, mortgages do not seem, as to the beneficial interest, to be within the words 'lands and tenements,' in the fifth clause of the statute; nor will such interest in general pass by a devise of lands, tenements, and hereditaments; (130) but if a mortgagor ^{by his will expressly de-}

(u) Vide *Casborne v. Scarfe*, 1 Atk. 605. *Sir Litton Strode v. Lady Russell*, 2 Vern. 621. *Winn v. Littleton*, 1 Vern. 3. 2 Vent. 351. 3 P. Wms. 61—2.

(130) 2 Vern. 621. L. being seized of several manors and lands, and also of mortgages in fee, which were forfeited, and of a great personal estate, having no issue, made his will, and after devising part to his wife for life, and other legacies, "gave all other *his lands, tenements, and hereditaments*, out of settlement, to his nephew." And one of the questions in the case was, whether these mortgages passed by the will under the general words, *lands, tenements, and hereditaments*? And it was held by the Lord Chancellor, the Master of the Rolls, Lord Chief Justice Trevor, and Justice Tracy, that the mortgages in fee, though forfeited when the will was made, did not pass by these general words. But the decree in that case, as it is stated in the Register's book, B. 1707, fol. 510, takes no notice of any mortgages, except those whereof the testator, after making his will, had purchased the equity of redemption. The case of *Winn v. Littleton*, 1 Vern. 3, presents a particular ground for construing the mortgaged lands out of the general words. And according to Reg. lib. 1680, fol. 452, the decree leaves it equivocal, whether the party directed to convey was devisee or heir. Upon the whole, there seems to be no good ground for holding mortgaged lands not to pass by the general words, uncontrolled in their effect by inference from the particular dispositions. The case *ex parte Bowes*, stated in the note to *Casborne v. Scarfe*, 1 Atk. 605, edit. Saund. has been denied in later cases, and the doctrine seems now settled, that the *words may* restrain the generality of the expression. Vid. *But. Co. Litt.* 203, b. n. 96, and *Duke of Leeds v. Munday*, 3 Vez. jun. 348. Where the devise is to executors, or trustees, for paying debts, the intent is promoted by construing the mortgaged lands to pass. Vid. *ex parte Sergison*, 4 Vez. jun. 147.

views the mortgaged lands, or makes a general devise of his lands, having only mortgaged lands, it should seem, that the interest in the money is thereby carried to the devisee, and the right in equity to the land, as the pledge, accompanies, although the will be not attested according to the statute. It is clear, that the mortgagor cannot pass his equity of redemption by a will unexecuted, according to the statute; and if the mortgagee were also under the same restriction, the statute would cut two ways, and equity would be inconsistent with itself, inasmuch as such double operation of the statute would imply the existence of the real estate at the same moment in two persons distinctly. The truth seems to be, that the mortgagee's interest is contemplated in this court rather as a *right* than an *estate*, while the equity of redemption assumes rather the quality and characteristics of an estate, than a right. Thus it was said by Lord Hardwicke, that in the eye of a court of equity, the equity of redemption was the fee-simple of the *land*(x) and though Sir M. Hale called it an equitable right, yet he added, that it was inherent in the land, binding all persons coming in the post, or otherwise.(131)

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(x) 1 Bl. Rep. 145.

(131) Hard. 469. Yet there are bounds to the expansion of this doctrine of transmutation of estates, in the equitable notion of a mortgage. Thus, if it were applied to the statute of mortmain, it would militate against the obvious purposes of the legislature in the provisions of that law. It was, therefore, determined by the Master of the Rolls, (Sir John Strange) in the Attorney-General v. Meyrick, 2 Vez. 44. that where a mortgagee in possession devised the benefit of his mortgage to a charity, it was within the mortmain act. And his honour would not allow the distinction attempted to be made on the part of the relator, between a devise of the mortgaged premises, and of the money due on mortgage. Nor did the circumstance of the mortgagee being in possession under a *habere facias possessionem*, seem to weigh at all in the case, the reason of the determination being, that the devisee would acquire a right of making the pledged estate his own by foreclosure, unless the money were paid. His Honour observed, that by a gift of all one's mortgages to A, the whole beneficial right passes to him; and be the legal estate either in the heir, or executor, each would be considered as a trustee for A, who would be permitted by the court to use their names, to get the

But this equitable consideration of a mortgage, as personal estate, is not permitted to narrow the effect of the statute of mortmain.

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An unexecuted will is not even of force to raise a case of election against a person taking a benefit in the personal estate by the same will.

It is to be observed, that a will of real property, not executed and attested as the statute directs, is classed among those acts which the law holds to all intents and purposes void; inasmuch, that neither courts of equity or law will pay regard to the intention of the testator, unless he has given it utterance and effect in the manner dictated by the statute of frauds. Upon this principle, such unexecuted will is not even of force in a court of equity to raise a case of election against a person taking a benefit in the personal estate. (y) In *Hearle v. Greenbank*, (z) D. W. devised all his freehold, copyhold, and real estate whatsoever, and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators and assigns, in trust, to apply the residue, after paying their own charges, to the separate use of his daughter, M. W. a married woman, during her life, and to be at her disposal, and not subject to the debts or controul of her husband;

(y) 7 Vez. jun. 372.

(z) 1 Vez. 198.

money, or make the pledged estate his own by foreclosure. If it would be so in that case, then would it be equally so, though the devise was, in phrase, of *money due on mortgage*; where, unless the court construed it to pass the whole interest of the mortgagee, it would be in effect a void devise. It had been rightly compared to a devise of rents and profits, by which the land itself would pass; that such a construction ought to be made by the court, as would be most effectual to repel the mischief, and advance the remedy. Therefore, if this devise tended to let in the mischief intended to be prevented, it was the duty of the court to guard against its taking effect. He was of opinion, that the devise came within the express words and plain intent of the statute; the design of which was to lay a restraint on every method, whereby land might possibly come to such hands, unless by the manner therein prescribed; but seeing that it would not sufficiently answer the intent of the legislature, if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of lands. But was there no other way whereby the interest in land might come to a charitable use? Yes; money due on mortgage was a charge and incumbrance on the land, the payment of which depended on the pleasure and ability of the mortgagor: therefore, parliament had, by express words, taken in that by a third clause; the words of which, if they did not extend to mortgages, he was at a loss to know for what purpose they were put in. The meaning was, that you shall not give to a charitable use that which is or may be a charge upon land, though not so at the time of the gift.

her receipts to be good, and to permit her by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, and to give and dispose of all his freehold, copyhold, and leasehold estate, as he should think fit; and gave to the same trustees, whom he made joint executors, his personal estate, in trust, for the sole and separate use of M. W. and to be at her disposal, and not subject to the debts or controul of her husband. M. W. then under the age of twenty-one, but above seventeen, made her will, and thereby, in pursuance of her power in her father's will, gave 8000*l.* to her daughter Mary, when she attained the age of twenty-one; she then devised the residue of her real and personal estate to the plaintiffs, the two *Heavies*, their heirs, executors, and administrators, forever. The bill was brought by the plaintiffs to have the appointment made by M. W. of the real estate in their favour established; but the court held the will as being void, by reason of the nonage of the mother, and consequent inability to make a will of land, to be a bad execution of power; and then the question arose, whether the heir at law could take the legacy of 8000*l.* under the will, which was well devised, (the testatrix being of a capacity to dispose of personalty) and at the same time claim the lands by descent, against the appointment, or was put to her election, upon the rule of not disputing a will in any part under which you claim. And the case for the daughter and heir was thus put at the bar. It was said, that the rule was true, when properly understood, that wherever a person claims under a will, and by the same will, *properly executed*, land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute the title; the will, manifesting the intent how the whole should go; but that rule did not go to make good what was in effect *no will*; that the case under consideration was one in which, there was *no will*, and that it was not the case of a will impeached for want of title in the testator; it was like a devise to a charitable use, since the statute; it was not want of title, but want of capacity to make any will at all of real estate. To this distinction the Chancellor seemed to accede. His Lordship observed, that as to the equity of the plaintiffs from the claim of the 8000*l.* it was true, it was determined in *Noys v. Mordaunt*, (a) that if lands in fee were given to one child, and to

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another lands entailed, it is meant they should release to each other, and the court had gone farther since—to the case of a personal legacy. But still he was of opinion, that this differed from all these cases, and that the heir at law was not obliged to make her election, for in the case before him *the will was void*; and that where the obligation arose from the *insufficiency of the execution, or invalidity of the will*, there was no case where the legatee was obliged to make an election; for there was *no will of the land*. And his Lordship put the case of a devise of a legacy out of land by a testator to his heir at law; and of the land to another; where, if the will be *not executed according to the intent of the testator* for the real estate, the court will not oblige the heir at law, upon accepting the legacy, to give up the land. That such a case differed from *Noy v. Mordaunt*, in the reason of the thing; there the testator devised some lands which were, and others which were not, his own; and the court said, that the devisee should suffer the lands to pass, as if they were the deviser's own. But in the principal case, whether the lands were the testator's own or not, they could not pass by the will.

But if in such unexecuted will there is a legacy to the heir upon condition that he did not dispute the will, he is put to his election.

But in *Boughton v. Boughton*,^(b) a distinction was taken as to this point, by the same Chancellor who determined *Hearle v. Greenbank*, which has been recognised and confirmed by subsequent authorities, though with some remarks upon its refinement and subtlety. In this case of *Boughton v. Boughton*, it was held that a legacy to an heir, upon the express condition that he did not dispute the will, would put the heir to an election, either to accept the legacy, or the lands devised away, although the will was not executed according to the statute. The case was as follows: A freeman of London devised his real estate to his younger son, Stephen Boughton, and all his personal estate among his children; "among the rest, 1200*l.* upon some contingencies to Grace, the daughter of his eldest son; adding this clause, "if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as relates to them severally, shall forfeit all claim and

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(b) 2 Vez. 12.

pretence whatever under my will; and shall have no more than the orphanage part of the personal estate I do possessed of; revoking what I gave to them, I give it to my residuary legatees: the testator underwrote to this instrument, an attestation in the common form, but it was not subscribed by him, nor did any witness subscribe it all; there was a codicil, without date, but signed by him, therein taking notice of and reciting, that in further consideration of this his last will, he made a codicil thereto, and gave directions therein.

Grace, by the death of her father, became heir at law to her grandfather, and so entitled to whatever he left to descend, or which ought to descend, from the invalidity of his disposition. She being an infant of tender years, this bill was brought by Stephen, the youngest son of the testator, and devisee of his real estate, in order that she might make her election, whether she would have the 1200*l.* or the land which happened to descend to her; for that she could not claim both; but, if she chose the legacy, she must let the real estate go according to the intent. The point is so particular, and the Chancellor's judgment so luminous and discriminating, that I have deemed it most profitable to the reader to lay it before him much at length.

His Lordship said, he was satisfied that the infant ought not to take the benefit of this personal legacy, without at some time or other waiving any right to the descended lands; and it was very different from *Heale v. Greenbank*. The testator had made one instrument, in which he had used words, expressions and clauses, relative both to real and personal estate; and in it is contained a clause, importing in words, though not by force of the instrument, to be a devise of the real to the plaintiff, giving 1200*l.* to his grand-daughter, and taking upon him to dispose of his whole personal estate among his children, who would not be bound thereby, as he was a freeman. He then added the express clause which was the sole ground of distinction between this and other cases; and in the codicil, took notice of that very instrument as a will. Which codicil was signed, and put that difficulty, which otherwise might have arisen from the imperfection of the instrument, out of the question. But notwithstanding this, it was a will only by force of the instrument, to pass personal estate; for neither the will or codicil was so executed as to pass real estate. The plaintiff insisted, that the defendant, having a legacy

by the will, which was undoubtedly good, should have no benefit thereof, unless she suffered the disposition of the land to take effect. In *Ney v. Mordaunt*, (c) (which was the first case) the testator was disposing of land. The subsequent cases, till *Streatfield v. Streatfield*, (d) were all of a devise of real estate. Had the rule gone no further, but been confined to real estate, this objection had never risen, because the instrument must be effectual, as well to one real estate as another; so that if they had both been real estates, this difficulty could never have arisen so as to make the point come into question. Lord Talbot went so far as, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to a tenant in tail, to consider it as an implied intent, that whoever took by that will, should comply with the whole; so that he put the party to an election; but neither in *Jenkins v. Jenkins*, nor in *Streatfield v. Streatfield*, was there a question of the *defect of the instrument*.

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*Then came *Hearle v. Greenbank*, which was the first case, in which the difficulty arose upon the *defect of the instrument*. In which case his opinion was, that there was no ground for the court to imply a condition to abide by a will of land, when there was none; and that it would be dangerous to break in upon the statute of frauds, by making an estate to pass by an instrument not sufficient to pass real estate; and that, not by the words of the testator, but by a condition implied by construction of the court; therefore it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator, who might leave it with that very view. But the question was, whether the case before him did not differ from that by reason of the express clause in the will. It had been very candidly admitted, that if there was no devise of a real estate, but a personal legacy was given on an express condition, that the legatee should not enjoy it, unless within a certain time he conveyed a real estate, whether coming from the testator or not, he should not enjoy it but on those terms; the lands not passing by force of the will, but by the operation of the particular clause stipulating the condition. The legatee had it in his power either to part with the land or not; if he chose not to part with the land, he forfeited the condition; for any lawful condition might be annexed.

(c) 2 Vern. 581. (d) Cas. Temp. Talb. 176.

The case might be put a little farther; his Lordship said, (though it was almost the same as the present) as, suppose, in the same instrument there was a devise both of real and personal, the will executed only to pass the personal, and not the real; but a condition annexed that the personal legatee should permit the same person, to whom the land was given, to hold to them and their heirs: the condition annexed would take place, though the devise was void as to the lands, according to the statute of frauds; for the legatee could not take it in contradiction to the testator's words; and the devise in the principal case amounted to the same as if the testator had annexed a condition to permit Stephen *to enjoy the land. The court must put a reasonable construction, which was, that none of the devisees should receive any benefit by the will, unless they suffered the whole instrument to take effect; not having regard to the validity or force of it, according to the statute of frauds, but to the clauses and expressions used. In *Hearle v. Greenbank*, there was no condition expressed in the will; it rested singly on the construction the court was to make, upon the implied condition that those claiming benefit by it, should suffer the whole to take effect; and then it must necessarily refer to the validity of the will; for it was rightly argued, that the will could not be read so as to support a disposition of real estate, not being an instrument to that purpose. In that case, when the court was to make such a construction by implication from the force of the instrument itself, the court must see the will, and could not take notice that that was a will of real estates; but in the case before him, where there was such a condition annexed to a personal legacy, the court must consider every part of that, whether it was a matter relating to real estate or not. You must read the whole will relating to the personal legacy, let it relate to what it will; which was a substantial difference, his Lordship said, and would prevent his going so far, as to break in upon the statute of frauds, and at the same time would attain natural justice, which required, as far as might be, such construction to be made, otherwise the intent of the testator might be overturned.

But as there might be a difficulty how to carry the will into execution, for being an infant of tender years, she could not judge for herself, nor could the master judge for her, it being on several contingencies, so that until she came of age, no election could be made, his Lordship said, the plaintiff must till then re-

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* [378] *ceive the rents and profits of the estate, subject to further order of the court, but must be restrained from committing waste. If the infant should elect to have the land, then whatever the plaintiff should be entitled to as his orphanage part of the testator's personal estate, *would be liable to make satisfaction for what he should have received out of the rents and profits of the real, as the court should direct.*

This distinction taken by Lord Hardwicke, between the cases of *Hearle v. Greenbank*, and *Boughton v. Boughton*, was recognised and adopted by Lord Kenyon, in *Carey v. Askew*, (132) which case has already been cited for another point in a former part of this chapter, and of which the Chancellor gave the following account, as to the point now under consideration, from his own note. "I have looked at my own note of *Carey v. Askew*. Lord Kenyon there said, the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an *express condition* to give up a real estate, by that unattested will, attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, and he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that, if there was nothing in the will, but a mere devise of real estate, the will was not capable of being read as to that part; and unless the legacy was given so that the testator said expressly, that the legatee should not take, unless that condition was complied with, it was not a case of election. The reason of that distinction, if it were *res integra*, is questionable."

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It seems that
if a man have
leaseholds
and free-
holds, and

One more point occurs to me as proper to be mentioned, before this part of the subject, respecting the *extent* and *operation* of the statute of frauds, is concluded. It was held in **the case of Rose v. Bartlet*, (133) in the eighth year of Charles the First, that

(132) The case is reported in 2 Brown, C. C. 58.; but the point under consideration in the text only appears to have made a part of it, by the notes of it referred to by the counsel for the heir at law, and by the Chancellor, in *Sheddon v. Goodrich*, 8 Vez. jun. 481.

(133) Cro. Car. 293. pl. 3. The authority of this case has been submitted to (as Mr. Coxe observes in his note to *Addis v. Clement*, 2 P. Wms. 458.) in *Day v. Trigg*, 1 P. Wms. 286. *Davis v. Gibbs*, 3 P.

if a man have lands in fee, and lands for years, and devises all his lands and tenements, only the fee-simple lands pass, and not the leasehold estates. But if a man devises all his lands and tenements, having leases for years, and no freehold, the leases for years will pass; for, otherwise, the will would be merely void.^(c)

devise all his lands and tenements by a will unattested, the leaseholds will not pass.

And if a man devise all his lands and tenements at a particular place, and have only leaseholds answering to the local description, upon the same principle the leaseholds will pass. But what if a testator have both fee-simple and leasehold lands at a particular place, and he makes a will, devising all his lands and tenements at that place, by a will not executed to pass freehold estates, but duly proved in the ecclesiastical court, and sufficient to pass leasehold property? As in such a case the freehold cannot pass, will the leaseholds be carried to the devisee? This was one of the points in *Chapman v. Hart*,^(f) determined by Lord Chancellor Hardwicke, where a testator devised all his lands at or near Fowey to the plaintiff, so situated, and the will was executed in the presence of two witnesses only. The Chancellor observed, that it was not certain whether the testator had any leasehold in or near Fowey. If there should appear to be both, and the law had been with the plaintiff, so that she should be entitled thereto, it would be a ground for the direction of an inquiry; for the answer was not a positive negation of any leasehold. But if, let the fact come out how it would, the law would be against the plaintiff, he ought not to direct an inquiry. And he was of opinion, that though it should appear that the testator had leasehold as well as freehold, the plaintiff could not be entitled. It was clear, since the case of *Rose v. Bartlet*, that such a devise should be confined to the freehold, and the leasehold should not pass, unless there was only leasehold, for then they should pass, that the will might have some effect.

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But the distinction taken for the plaintiff did not hold; for it was applying the reason in that resolution in *Rose v. Bartlet*, to

(c) Vide *Knotsford v. Gardiner*, 2 Atk. 450.

(f) 1 Vez. 371.

Wms. 26. *Knotsford v. Gardiner*, 2 Atk. 450. and *Pistol v. Richardson*, reported in the same note; in which last case the authority of *Addis v. Clement*, which relied on the words "all the lands which the testator was seised or possessed of, or any ways interested in," was shaken. Vid. 6 T. R. 345. *Lane v. the Earl of Stanhope*.

a different purpose, from what it was there, where it was applied to the construction of the words, the intention of the testator arising from the fact. Here it was a presumed intent, arising, not from the words, but from a defect in the execution of the instrument, and his supposed knowledge in the law of that defect, and that he intended to pass only what might pass. But that defect in the execution of the instrument could not warrant the court to make a different construction from what it would if duly executed; which then would be, that the freehold lands only would pass. Suppose a case (which though he did not know to be determined, he should not doubt to determine so) of a person seised of freehold and copyhold in D. who surrendered to the use of his will, and devised all his lands and tenements in D. to his child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned should be applied; there being no surrender to the use of the will, to show a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender; though this were to a child or wife, the court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the court would not have supplied that defect: for

* [381] *such variation of the construction would be very dangerous, and might make terms, and perhaps terms attendant of the inheritance, to pass; there was no ground therefore for an inquiry,

PART III.

Of the signature of the testator and the subscription of the witnesses.

HAVING treated in the preceding part of this chapter of the operation and extent of these sections concerning wills, it remains for me to inquire into the state of the law on the essentials, held requisite for satisfying the statute in regard to the signature of the testator, and the subscription of witnesses. The formalities required, are, 1st. That the will be in writing; 2d. That it be signed by the deviser, or some other in his presence, and by his direction; and 3d. That it be attested and subscribed

in his presence, by three or more credible witnesses; The necessity for the will to be in *writing*, and the addition *in this respect* made to the statute of wills by the statute of frauds, by reason of the more extended range of its operation, has been already considered. The signature of the testator comes now, therefore, to be treated of.

If the language made use of by the legislature, were to be understood in its natural and usual sense, it should seem that there could be no great contention in regard to the meaning of the words 'shall be signed by the devisor,' which, to all popular and official purposes, is considered as importing the actual and formal subscription of the name of the party at the bottom of the instrument, to authorise or ratify the contents. And by directing this to be done in the presence of three witnesses, the statute would seem to every mind unused to artificial distinctions, to require that the attestators should have ocular and simultaneous evidence of the act of signing performed by the testator.

What is a sufficient signing.

*Very soon, however, after the legislature had thought fit to place these guards about a dying man, in the last and most momentous act of temporal concernment, courts of justice, yielding to the popular bent towards an excessive freedom and facility in all kinds of alienations of property, instead of executing the intention of parliament, seem to have been resolved to employ all the resources of their astuteness to frustrate its caution, by an elaborate intricacy of enervating distinctions.

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In the case of *Lemayne v. Stanley*, (134) which was determined about four years after the statute was passed; it is surprising to observe, with what little ceremony the solemnity of signing was treated, and how lax were the principles of interpretation which were to lay the foundation for the future application of a law, deeply affecting the whole property and commerce of the kingdom, and framed for the prevention of those frauds, the very sinews of which are the uncertainties of the law. *Stanley*, seized in fee, wrote his will with his own hand, beginning thus, "In the name of God, amen. I, John Stanley, make this my last

If a will be written by a testator's own hand, with his name inserted, the statute is held to be satisfied as to the signature of the testator.

(134) 3 Lev. 1; and again in the case of *Hilton v. King*, Lord North and Levinz agreed that it was immaterial, whether the signing be at the top or bottom of the will, for the statute doth not say subscribed, but signed by the testator.

Whether
sealing is
signing.

* [385]

In the case of *Lemayne v. Stanley*, above cited, three of the judges, including the chief, were of opinion, that the *testator, by *putting his seal* to the will, had sufficiently signed within the statute, for they said that a signum was no more than a mark, and sealing was a sufficient mark that it was his will. In *Warneford v. Warneford*,^(t) which, after a long interval, seems to have been the next case in which this question came to be considered, it is said to have been held by Lord Raymond, on an issue out of Chancery of *devisavit vel non*, that *sealing* a will was a *signing* within the statute of frauds. We are to observe, that in *Lemayne v. Stanley*, the opinion of the judges must be regarded as spoken *obiter*, the case being decided on the ground of the sufficiency of the insertion of the name in a will, written by the testator; and the point in *Strange*, as stated only in a short note, was agitated at *nisi prius* only. But this doctrine was but ill received in the subsequent case of *Smith v. Evans*,^(l) wherein Lord Chief Baron Parker, Baron Clive, and Baron Smith (in the absence of Baron Legg) are stated to have said, that the opinion of the three judges in *Lemayne v. Stanley* was very strange; for that if it were so, it would be very easy for one person to forge another man's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand. And the same judges declared, that if the same thing should come into question again, they would not hold that *sealing* a will *only*, was a sufficient signing within the statute. The Chief Baron seems to have been less resolved on the same question, in the opinion delivered by him in *Ellis v. Smith*,^(m) in which he thus expressed himself: "As to the point, whether sealing be signing; I own I think it is not; for the character and hand-writing are necessary, and were designed to prevent or detect frauds and impositions. But, however, said his Lordship, as in some cases it has been thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion." But Willes, C. J. said decidedly in the same case, that he did not think *sealing* was to be considered as *signing*; and he added, that *he declared so then, because, if that question ever came before him, he should not think himself precluded from weighing it thoroughly, and decreeing, that it was

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(t) 2 *Strange*, 764. (l) 1 *Wils.* 313. (m) Reported in 1 *Veaz.* jun. 11.

not signing; notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters; for, upon examination, he had found that many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him. (136)

The opinion of Sir John Strange, Master of the Rolls, was on this point correspondent to that declared by the Chief Justice. He observed, that he was not convinced that sealing was signing; for sealing *identified nothing*; it carried no character; and most seals were affixed by the stationers, who prepared the paper. Lord Hardwicke did not, according to the report, speak in this case, as to the question of sealing, but in a case which had been determined by him two years before, (n) his Lordship had expressed himself in stronger language, to the same effect with the Lord Chief Justice Willes and Sir J. Strange; he then declared, "that the statute, by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing; then how could it be said, that putting a seal to it would be a sufficient signing? for any one may put a seal; no particular evidence arises from a seal; common seals are alike; no certainty or guard therefore arises from thence."

THE late case, which will be presently produced, it was a considerable doubt with the profession, whether, if a testator or witness, could not write his name, he might satisfy the statute by making his mark. In the case of *Lemayne v. Stanley*, as it is reported in *Freeman*, (o) it is said that the "court were of opinion, that it was not necessary for the testator to write his name, for some cannot write, and there their mark is a sufficient signing. But this opinion, though entitled to great deference, as being stated to have been that of the court, and not of a single judge, yet, as being uncalled for by the facts of the case, must be regarded as extrajudicial. Hudson's case, (p) which was determined about a year after *Lemayne v. Stanley*, where two

Whether making a mark, where the party is unable to write, is a sufficient signing or subscribing.
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(n) *Grayson v. Atkinson*, 2 Vez. 459.

(o) *Freem. Rep.* 538.

(p) *Skin.* 79.

(136) See *Show.* 69, *Lea v. Libb*, where Lord Holt is said to have held sealing to be a signing.

witnesses swore that J. S. the testator did not publish the writing as his will, but that A. B. guided his hand, and J. S. made his mark, but said nothing, was too mixed a case, to be admitted as an authority to this point.

The observations made by Sir John Strange in the above cited case of *Ellis v. Smith*, on the question as to sealing, do certainly seem as strongly to apply to a testator's mark, for it identifies nothing: it carries no character. But in the late case of *Harrison v. Harrison*,^(q) it was decided by Lord Eldon, that the attestation of a devise by a mark, was good within the statute; and as the statute requires the attestators to *subscribe*, and the testator to *sign*, it may be thought that the principle of this determination is applicable *a fortiori* to the signature of the testator himself, since the word 'subscribe' seems much more forcibly to point to the actual hand-writing, than 'sign,' which, without any strain upon its grammatical sense, though, perhaps, not without some sacrifice of its popular and usual acceptation, might be deemed to be satisfied by *any symbol* of the testator's consent and ratification.†

* [388] In the above-mentioned case of *Harrison v. Harrison*, the question was made upon a bill by devisees against the heir, *whether the will was duly executed to pass real estate according to the statute of frauds, one only of the witnesses having subscribed his name, the two others having attested by setting their marks respectively. Lord Chancellor Eldon observed, that upon inquiry from Mr. Serjeant Hill, he had found, that there was a special case reserved in the Court of Common Pleas whether, a will devising real estate was well executed, one of the witnesses being a marksmen; and it was held clearly sufficient. It was a case of *Gurney v. Corbet* in 1710, in a note book, which was the property of Mr. Justice Burnet. His Lordship said, he thought there might have been a great deal of argument upon it originally. But upon this authority the plaintiff must take a decree. In a few months afterwards, the same point was determin-

(q) 8 Vez. jun. 185.

† The counsel for the plaintiff is stated to have adverted to the difference of expression in the statute, with reference to the witnesses and the devisor; and to have remarked the difficulty of making the proof, in case of the witnesses being dead.

ed by Sir William Grant, Master of the Rolls, in *Addy v. Grix*,^(r) agreeably to the decision of the Chancellor in *Harrison v. Harrison*, and, therefore, seems now to be at rest.⁽¹³⁷⁾

It seems to be fairly inferible from the decision in *Lemayne v. Stanley*, that the court were of opinion, that it was not necessary that the witnesses should attest the very act of signing, but that an acknowledgment by the testator, that the act of signing was done by him, was sufficient for them to attest; for since not the sealing, but the writing over the will with the testator's name in it, was the ground of the decision, the witnesses *must have seen this done, if it was judged insufficient for them to attest upon the acknowledgment of the testator; but this was not so found by the jury, or it would have put an end to all controversy upon the case; and if the witnesses did not attest the writing of the whole will by the testator, their attestation could only go to his acknowledgment of his signature. This point, however, seemed to exist in some doubt during a long time after the statute was passed. In *Dormer v. Thurland*,^(s) where the will was not signed by the testator in the presence of the witnesses; but he acknowledged it to be his hand, and declared it to be his will in their presence; Lord Chancellor King inclined to think that the will was good, but ordered the point to be reserved, and made a case for further consideration.⁽¹³⁸⁾ However, in *Stonehouse v. Evelyn*,^(t) which came before the Master of the Rolls (Sir J. Jekyll) a few years afterwards, the will was held good, though the witnesses did not see the testator sign it, but he owned it before them to be his

It is sufficient if the witnesses attest upon the acknowledgment by the testator of his signature, without seeing him actually sign.
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(r) 8 Vez. jun. 504. (s) 2 P. Wms. 506. (t) 3 P. Wms. 254.

(137) According to the report of the case of *Lemayne v. Stanley*, in *Freeman*, the court were of opinion, that if the testator had his name on a stamp, it would be enough if he thus impressed his name instead of writing it. And in *Strange v. Barnard*, 2 Bro. C. C. 585, it was held, that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was not admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number) was called in to subscribe in the place of the testator. C. 6. 23. 1.

(138) But the judges of B. R. on argument, held the will void, as a charge, for want of being sealed, according to the direction of the power.

hand. And the reporter adds, that on his mentioning this opinion of the Master of the Rolls to Mr. Justice Fortescue Aland, he said it was the common practice, and that he had twice or thrice ruled it so upon evidence on the circuit; and that it was sufficient if one of the three subscribing witnesses swore that the testator acknowledged the signing to be his own hand-writing. Sir Joseph Jekyll had delivered a similar opinion a little before in a case of *Smith v. Codron*, cited by Lord Hardwicke in *Grayson v. Atkinson*.^(u) In that case, A. signed and published a will in the presence of two persons, who attested it in his presence; then a third person was called in, and the testator showing him his name, told him, that that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence; and the testator, two hours after, told him "that the paper he had subscribed was his will. His Honour held this to be a good execution.

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But in the instructive case of *Grayson v. Atkinson* above referred to, this point came fully under the consideration of Lord Hardwicke. The bill was to establish a will against an heir at law, who, by his answer, raised the doubt, whether as all the witnesses did not see the testator sign, though *he saw them* all sign, this was a good attestation within the statute. The Chancellor, advertg to the argument of the counsel for the defendant, in which they had insisted, that the word '*attested*' superadded to '*subscribed*' imports that the attestators shall witness the very act and factum of signing, and that the testator's acknowledging that act to have been done by him, and that it is his hand-writing, is not sufficient to enable them to attest, but that it must be an attestation of the thing itself, and not of the acknowledgment, observed, "that certainly there must be an attestation of the thing in some sense, but the question was, whether, if they attest on the acknowledgment of the testator that that was his hand-writing, that was not an attestation of the act, and whether it was not to be construed agreeable to the rules of law and evidence, as all other attestation and signing might be proved. At the time of making that act of parliament, and ever since, if a bond or deed was executed and signed, and afterwards the witnesses were called in, and before the witnesses, the person making it, acknowledged

(u) 2 Vez. 455.

the signature to be his hand-writing, that was always considered as an evidence of signing by the person executing, and was an attestation of it by them. It is true, said his Lordship, there is some difference between the case of a *deed* and a *will* in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging the sealing, without witnesses, has been sufficient.† But, notwithstanding, that is the rule of evidence in respect to signing. If it was in the case of a note, or declaration of trust, or any other instrument not *requiring the solemnities of a deed, but bare signing, if that instrument is attested by witnesses, proving that they were called in, and that the party took up the instrument, and said, that was his hand, such would be a sufficient attestation of the signing by him. That is the rule of evidence. Considering, therefore, the words of the act of parliament, it seems, that if the testator having signed the will, did, before the attestators, declare and acknowledge he had so done, and that the signature was his hand, that might be sufficient to make the attestation good."

* [391]

The great case of *Ellis v. Smith*,(x) came on in 1754, which was about two years after *Grayson v. Atkinson*, and here the Lord Chancellor Hardwicke was assisted by Sir John Strange, Master of the Rolls, Willes Chief Justice of B. R. and Parker Chief Baron. The form in which the question is reported to have been put, was, whether a testator's declaration before three witnesses, that it was his will, was equivalent to signing it before them, and constituted a good will within the 5th section. The determination of *Grayson v. Atkinson*, by Lord Hardwicke, was in this case mentioned by the Master of the Rolls, as an authority full to the point upon the first question; and his Honour said, that to determine otherwise at that time, would introduce confusion and uncertainty, and sap the foundation of much property which rested on former decrees.

The court was unanimous, in holding such acknowledgment by a testator to the attestators of his will, to be good within the

(x) 1 Vez. jun. 11.

† But see *Grellier v. Neale* and others, Peake, Nl. Pri. Ca. 146. See also *Parke v. Mears*, 2 Bos. et Pull. 217.

hands as witnesses to it, which they all three did in his presence, but *without seeing any of the writing, or being told by the testator it was his will, or what it was*, but that he believed it to be the same paper, because his name was there, and the names of the other witnesses, and he never witnessed any other paper for the testator; this was held to be a sufficient publication of the will, after the statute of 29 Car. 2. but it should be remembered, that Lord Hardwicke, in the case of *Ross v. Ewer*, 3 Atk. 161. mentioned a case of Mr. Windham of Clearwell, in the court K. B. which was a trial at bar, upon the will of his uncle; wherein the only question was, whether the testator *published* it; there was no doubt of his having executed it in the presence of three witnesses, or of their having attested it in his presence; which showed, his Lordship said, that *publication* is, in the eye of the law, an *essential* part of the execution of a will, and not a mere matter of form.

The point, therefore, seems subject to some doubt, whether *publication* is to be considered as a mere floating term, expressing generally the act of authenticating and announcing the veritable will of a testator, but depending as to the mode by which it is to be effectuated, on the particular ceremonies and solemnities prescribed by the legislature and construed and applied by courts of justice, or imposes a specific obligation upon the testator *beyond* the execution and attestation of the will according to the statute of frauds. If any positive declaration by the testator, that it is his will, be necessary to constitute a sufficient publication since the statute, it does not seem that the mere acknowledgment of the signing can operate as an equivalent, for the acknowledgment of the signing, unless the testator at the same time acknowledge his will, cannot be more extensive *in effect than the act of signing in the presence of the witnesses. Upon the whole, however, we are to consider that, great as is the weight of Lord Hardwicke's opinion, it was delivered on this point in *Ross v. Ewer*, gratuitously and extrajudicially; whereas the cases of *Peate v. Ougley*, *Trimmer v. Jackson*, *Stonehouse v. Evelyn*, and others, which have been cited for the contrary doctrine, are decisive and direct authorities.

[395] *
A will,
though it be
proceeded in

It is established by the agreement of all the cases, that a testator may make his will at different times, if the subsequent writing

takes up and continues the former ; and it matters not by how long the intervals these acts are separated ; they will compose one entire instrument, if the first purpose appears to have proceeded to its accomplishment, though with many pauses and resump-tions. Thus, (c) where an illiterate person made and signed his will, in which there was a devise of lands, and at a subsequent period added more to it *on the same sheet of paper*, and declared that he did not thereby mean to disannul any part of his former devise and disposition, and signed it, and then took the sheet of paper in his hand, and declared it to be his last will and testa-ment, in the presence of three witnesses, and desired the wit-nesses to attest it, which they did in his presence, this was held to be one entire will, though made at different times, and to be attested agreeably to the statute of frauds ; or, in other words, the additional writing was held to be part of *one entire will*, and not a *codicil*, and the execution and attestation to be an *original* publication, and not a republication.

But where the will was written on different pieces of paper, it was holden, that the witnesses ought to see *all* the pieces of pa-per, or the will was not properly attested. Thus, in ejection, (d) where the special verdict set forth, that J D. *made his will in 1670, with two witnesses who subscribed their names in his pre-sence ; and in 1679, made a codicil, and thereby confirmed his will in what was not altered, and inserted some new bequests, and there were two witnesses to it, one of whom had witnessed the will, and the other was a new one, the only point was, whe-ther these made together three witnesses to the will, to satisfy the statute of frauds ; but the court decided against the devise, be-cause the third witness was not a witness to the first will. There was no entire instrument attested by three witnesses. (140) And

at different times, and of-ten suspend-ed and resu-med, will need only one execution.

Of the exe-cution of a will written on different pieces of pa-per.

* [396]

(c) Carleton v. Griffin, 1 Burr. 549. Carth. 37, arguendo, and, as it seems, agreed to by Dolben, J.

(d) 2 Mod. 263.

(140) The reader should compare this case of Lea v. Libb, with Bond v. Seawell, 3 Burr. 1773. Blackst. 407, 422, 454 ; in which latter case it was proved, that C made his will, consisting of two sheets of paper, all of his own hand-writing, and signed his name at the bottom of each page ; and that he also made a codicil of his own hand-writing upon one single sheet, and then called in H, and showed him both the sheets of his will, and his signature to every page thereof, and told him that

if the additional *writing is not a resumption and continuation of the former, but a distinct act and disposition by way of codicil, it may operate as a republication of the will as to lands, if both the

that was his will, and then he showed H the codicil, and desired him to attest both the will and codicil; which he did in the presence of the testator, and then went out of the room. V and L came in immediately afterwards, and the testator showed them the codicil, and *the last sheet of his will*, and sealed both before them. C then took each of them up severally, as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but *never saw the first sheet of the will; nor was that sheet produced to them; nor was the same or any other paper upon the table; both the sheets of the will were found with the codicil*, in the testator's bureau, after his death, all wrapped up in one piece of paper; but the two sheets of the will were not pinned together; and the question upon these facts was, whether this will was duly executed according to the statute of frauds? After three several arguments before the court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment; his Lordship said, that the question made at the trial, and submitted by the case, as it stood, turned upon the solemnity of the execution, and they were of opinion, that the due execution of this will could not be come at, in the method wherein the matter was then put: that if this were considered as a special verdict, they thought *it was defectively found as to the point of the legal execution of the will*. But that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstances sufficient to *presume*, that the first sheet was in the room; and that the jury ought to have been so directed; but upon a special verdict, nothing could be presumed: therefore, they were all of opinion, that it ought to be tried over again; and if the jury should be of opinion, *that it was then in the room*, they ought to find for the will generally, and they ought to presume, from the circumstances proved, that *it was then in the room*.

It is to be observed, that *Lea v. Libb* was on a special verdict, and, therefore, no facts could be presumed; but it does not seem that the case afforded the same ground for presumption, as that of *Bond v. Seawell*, in which last case there were *three witnesses*, if any, to the *whole will*, for the question was not as to the complement of witnesses, but whether the *whole will* (the first sheet not having been seen by them) was covered by the attestation; whereas, in *Lea v. Libb*, it was necessary to make the will and codicil *one instrument*, before the attestation could be held sufficient, for to neither, and to no part of either, were there three witnesses; and if they were *distinct instruments*, it seems, according to the authorities, that each ought to have been attested by three witnesses, to have been valid within the statute.

will and codicil are attested respectively according to the statute; but if the will was not so executed and attested, the codicil will not help the defect, although it have the requisites of the statute, for what was bad in its *creation*, cannot be made good by any thing *ex post facto*, and the operation of a codicil, where it is a republication, is only to set up the will in its *original state and efficacy*, making it, *as far as it is efficient in itself*, by the solemnities of its execution and legal compass of expression, reach to the date of the codicil, and embrace intermediate acquisitions.†

* [398]

*Thus, a testator(c) devised his lands to trustees and their heirs, in trust for maintaining and providing for the poor scholars of a college in Cambridge, and for other charities, and the will was written with his own hand, but had no witnesses, and afterwards he made a codicil, which was duly executed and subscribed by four witnesses, wherein he recited and took notice of the will. And one of the questions in the case was, whether the codicil was a good publication of the will within the statute of frauds? It was contended on behalf of the devisees, that the codicil, taking notice of the will, and being duly executed, made the will valid in the same manner as if it had been affixed to the will at the execution thereof, for the law would construe it as part of the will, and its being laid in a different place signified nothing. But it was held, that the will was void, for though there were three subscribing witnesses to the *codicil*, yet that would not support the *will*.

Of the difference between a writing in continuation of a will formerly begun and a republication.

This difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act, is not very difficult to understand, though the partition will appear extremely thin when the theory is attempted to be shown by example, or applied in practice. Upon this distinction, however, will, it seems, depend the question, whether or not, the *first* act of testamentary disposition will require to be executed and attested according to the statute. But whether the *subsequent* writing be considered as a republication by way of codicil, or as the conclusion of something already be-

(c) Attorney-General v. Barnes, 2 Vern. 597. Prec. in Ch. 370.

† Vid. Heylin v. Heylin, Gowp. 130.

gun, as in the case just mentioned of *Carleton v. Griffin*, it appears quite clear, upon the principles of *Habergham v. Vincent*, already so much discussed, and the doctrines of other cases, that such *subsequent* writing, to be effectual to pass land, must be executed and attested as the statute directs, in the case of devises of lands.

* [399]

In what sense a codicil is to be understood as incorporated into, and making a part of the will.

*When a will, properly executed to pass freehold estates, refers to an unexecuted paper *already in existence*, by an unambiguous description, and expressly adopts its contents among its own dispositions, such paper is, with exact propriety, said to be incorporated into, and to be executed by the execution of the will, for its relation to it is that of the part to the whole ; but where a *codicil* is said to be part of, or incorporated into a will, this union must be understood to be the effect of its *first acting upon the will by its own force, and attracting it to itself*, instead of being adopted by the will, and absorbed into its frame and composition.— Hence, we see the necessity of its being executed according to the statute ; in the case put of the reference by the will to an existing paper, such paper is mute till it is acted upon by the will, and has no testamentary operation before it receives the strength imparted to it by the execution of the will ; whereas, in the instance of the *codicil*, the will is *first acted upon thereby*, and being brought down to the date thereof, speaks again with reference to the state of the property, by virtue, not of *its own original execution*, but of *the execution of the codicil*, with which it becomes incorporated, and thus, by consequence of reasoning, becomes *re-executed* and *re-published* with the solemnities prescribed by the statute.

Of the meaning and effect of a republication.

The effect and meaning, therefore, of a republication is, that the terms and words of the will shall be construed to speak with regard to the property of the testator, and the objects of his dispositions, just as they stand circumstanced at the date of the codicil ; (141) in construing such will so republished, it must be considered, therefore, what the words of the will, at the time of

(141) But the expressions of the codicil may prevent the passing of intermediate acquisitions, as, where the codicil, reciting the devise, revoked the same as to two of the trustees, and then devised the *said* lands, &c. the lands purchased between the will and the codicil did not pass. *Bowes v. Bowes*, 2 Bos. et. Pull. 500, 7 T. R. 482.

the republication, import ; their *sense* cannot *be enlarged,(142) but their *operation* may, if time or accident have increased the amount or number of the particulars comprised within the compass of its expressions.

After the statutes 32 and 34 H. 8, the courts of justice were frequently divided on the validity of parol republications of wills of lands, and it appears that in opposition to the clear sense of those statutes, the favour with which all testamentary dispositions were regarded, sometimes gave the effect of a republication to slight and unconsidered expressions. Thus, in the case of *Beckford v. Parnecott*,(f) which was determined in the 37th year of Elizabeth, where a man seised of lands in A, devised the same to B and C, and appointed them his executrixes, and then purchased other lands in A, and being requested to sell the lands which he had lately purchased, refused so to do, saying, "No, they shall go with my other lands in A, to my executrixes ;" and afterwards, being sick, the will was read to him, without his making any observation ; but in a codicil, which he annexed, he gave legacies of goods to other persons on his death ; upon a question being made, whether by these words, spoken to a stranger, the will was republished, so as to make the new purchased lands pass ; Fenner, Clench, and Popham held them to amount to a new publication.(143) But in *Fuller v. Fuller*,(144) which took place much about *the same time *[401]

(f) Cro. El. 493.

(142) Neither can the original effect of the limitations be altered ; as, if there be a devise to J. S. and his heirs, and J. S. die, and then the will is republished, the republication will not carry it to the heir. Plowd. 342; and see the case of *Stead v. Berrier*, 1 Vent. 341. Pollexfen, 546. T. Jo. 135.

(143) According to the report in Moore, 404, Gaudy, J. doubted. Dyer, 143, a. Marg. pl. 55, cites S. C. as adjudged, and says the main reason given by Fenner was, that the annexing of the codicil amounted to a new publication.

(144) Cro. El. 423. In Moore, 353, where the same case is reported, the reporter adds a quare, and says the reason given was, because the last publication was not in writing ; but the others thought there was enough before in writing, to pass the land to the issues, but there they were to take by descent, but, by the republication, by purchase.* The better opinion appears clearly to have been, that of Gaudy and Clench, according to the analogy of all the best cases.

with that of *Beckford v. Parnecott*, where the devise was to the testator's son Richard, and the heirs of his body : which Richard afterwards died in the life-time of the testator, and the testator said, "my will is, that the sons of Richard, my deceased son, shall have the land devised to their father, as they should have had if their father had lived, and died after me." Popham and Fenner held, that this was a new publication to carry the land to Richard's sons, but Gaudy and Clench were of a contrary opinion.

The point of republication was also frequently in agitation after the statute of Charles, and there are early decisions which discover great laxity of construction on the subject, notwithstanding the provisions of that statute. Thus, in *Cotton v. Cotton*,^(g) which was before the Court of Chancery, in the year after the passing of the statute of frauds, A being seised of several lands in D, made his will, devised his lands in D, and all other his lands and tenements whatsoever, unto his wife, and afterwards purchased other lands, and then discoursing with B, B desired him to let him have those newly purchased lands at the rate at which he bought them ; and the testator answered "No, for that he had made his will and settled his estate, and he intended that his wife should have his whole estate ;" the court inclined strongly to hold this a new publication, and particularly with respect to the lands, and that it was not material that the words should have been expressed *animo testandi*, for that must necessarily be intended when the discourse had particular reference to the will.

* [402]

By the report of the same case in Chancery Reports, *it appears that the point of republication was referred by the Court of Chancery to a trial at law, at which a special verdict, by the direction of Lord Chief Justice North, was found, and on a solemn argument before all the judges of C. B. they unanimously gave judgment for the devisee against the heir at law.

Whether there can be any implied republication of a will, since the statute of frauds.

A much greater regard to the statute, was shown about 40 years afterwards, by Lords Macclesfield and Cowper. By the former, when he sat as Chief in the King's Bench, it was held, that since the statute of Charles, there could not be an implied republication of a will of lands, even by the execution of a codicil referring thereto, but that the will must be re-exe-

(g) *Freem.* 264, 2 *Chan. Rep.* 138.

cuted.(145) At a trial at bar before his Lordship and the other judges of the King's Bench, the facts of the case appeared to be these. The Earl of Bath,(h) by his will, dated October the 11th, 1684, duly executed, took notice that his lands were settled upon his sons Charles and John, in tail-male, and then devised in these words : In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands unto my brother B. G. and the heirs male of his body issuing. B. G. died in the life-time of the testator, having issue, George, then Lord Lansdown, by which the devise to B. G. in tail-male lapsed. On the 15th of August, 1701, the testator sent for seven persons and said, I sent for you to be witnesses to my will, and sometimes to be witnesses to the republication of my will ; and then took a codicil, dated 15th August, 1701, in one hand, and the codicil in the other, and said, this is my will whereby I have settled my estate, and I publish this codicil as part thereof; and then signed the codicil (which lay upon the table with the will) in the presence of the witnesses, who *subscribed it in his presence. By the codicil, he devised in these words : " Whereas, I heretofore made my will, dated 11th October, 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations in my family and estate, I, by this codicil, which I appoint to be taken as part of my will, devise as follows ;" and then devised divers manors, &c. to his son Charles and his heirs, and 100*l.* *per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses ; but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but in the codicil only. And by Parker, Ch. J. and by the whole court, this was held no republication ; for, since the statute of 29 Car. 2, there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good.

*[403]

(h) Panphrase v. Lord Lansdown, Vin. Abr. tit. Dev. (Z.) 22.

(145) That a will may be republished by the testator's repeating upon it the ceremonies required by the statute, *vid.* Herbert v. Turbal, 1 Sid. 162. 1 Keb. 589.

Sir William Lytton,⁽ⁱ⁾ by his will, 23d March, 1700, devised all his lands to his nephew, Lytton Strode and his heirs, and directed that he should take the surname of Lytton ; and his personal estate he devised to Dame Russell, his sister, and Lytton Strode, and made them executors. After his will made, Sir William Lytton purchased the equity of redemption from the mortgagors in fee, of premises which were mortgaged to him before he made his will ; and on the 13th June, 1704, by a codicil attested by three witnesses, he said, I make this codicil, which I will shall be added to and be part of my last will which I have formerly made, and the Lord Chancellor Cowper assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, on the 16th June, 1706, decreed that this was a not a republication, for, that since the statute of frauds, there could be no devise of lands by an *implied republication* ; for the paper in which a devise of lands is contained, ought to be *re-executed* in the presence of three witnesses.

* [404]
If an estate be limited to B and his heirs, and B die in the testator's life time, the devise lapses ; and a republication of the will does not give to the heir of B a claim by purchase.

*With respect to the first of these two cases, determined by Lord Parker and the judges of the court of King's Bench, though the resolution seems to have been grounded upon the rule then adopted, of holding the statute of frauds to be inconsistent with all implied republications of wills, and which, consequently, forbade such effect to be given to a codicil which *declared no positive intention to republish the will*, yet, according to the principle of the case of *Brett v. Rigden*,^(k) above-mentioned, and the rule of construing a republication of a will, not to expand or alter the sense of its expressions, or the legal effect of its limitations, but to apply those expressions and limitations to the existing state of the subjects and objects of the dispositions at the date of the republication, I do not see how any other judgment could have been given, even on the supposition that the will *was* republished ; for if a will limits an estate to go by descent, and the person through whom the descent is to be transmitted, dies before the testator, the devise has clearly lapsed : and if such will is republished, no person can take an estate under it in any other way, than that in which the *original* limitation was calculated to give it to him ; he cannot take as a *purchaser* what, according to the effect of the limitation, he was designed to take by *descent*.

(i) *Lytton v. Lady Falkland*, Vin. Abr. tit. Dev. (Z.) (k) *Plowd.* 345 ; and see *Hartop's case*, Cro. El. 243.

The principle of this reasoning was recognised in *Sympton v. Hornsby*,⁽¹⁾ the question in which case arose upon the will of one T. A. who, having a wife and only two daughters, devised lands in several towns to his wife for life, for her jointure ; and, after the death of his wife, to his daughter Bridget, and the heirs male of her body ; and for want of such issue, to his daughter Jane for her life, and after her death, to her first and other sons, in tail-male successively, with several remainders over. Bridget died in her father's life-time, leaving issue a son, whom the grand-father took into his own house, and expressed much kindness for. Afterwards *the grand-father made a codicil which began thus : " A codicil to be annexed to my will." And thereby he gave some part of a leasehold estate (which by his will was given to his daughter Bridget) to her son, added another trustee for some charities, and duly executed the same. And the Lord Chancellor, after looking into the books, said he found it already settled, that Bridget dying in the life-time of the testator, the heirs male of her body could not take by purchase, for these words, ' heirs male of her body ' were inserted to express the quantity of the estate ; though if the thing were *res integra*, he thought it plainly the intention of the testator, that Jane should not take till there should be a failure of the issue of Bridget, for this he thought the words *for want of such issue* fully imported.

* [405]

These cases, therefore, involved circumstances which would have been an answer to the claims set up under the will on the ground of its being republished by the codicil, with oppugning the doctrine of an implied republication, for, upon the principle just above discussed, the republication of the will would not have extended the devise to the parties founding their pretensions upon it in those cases. However, in Lord Lansdown's case, we have observed, that Lord Parker in terms denied the possibility of any *implied* republication of a will of lands since the statute of frauds ; and in the case above mentioned of *Lytton v. Falkland*, the resolution *could* only be founded upon the supposed effect of the statute, to exclude all implied republications, where real property was in question.

Upon these authorities a clear doctrine arose, apparently agreeing with the provisions of the statute, the sense whereof ap-

(1) *Free. Ch.* 439.

* [406]

peared to be, that though the will and codicil were both executed according to the statute of frauds, yet the codicil should be no republication of the will, so as to draw down the date of such will to that of the codicil, but the will itself ought to be re-executed to affect real property acquired since its original execution. About 10 years after Lord Macclesfield, *then Lord Chief Justice Parker, had decided the case of *Panphrase v. Lord Lansdown* in the court of King's Bench, *Acherley v. Vernon*(*m*) came before him in the Court of Chancery, when his Lordship held an opinion on this subject, not conformable to that which he is represented to have pronounced on the former occasion. The case was as follows :

J. S. by a will dated the 17th January, 1711, devised to M. his wife, 1000*l.* *per annum* for her life, to issue out of his real estate at H. &c. to his sister E. 200*l.* *per annum*, for her life ; and 1000*l.* to L. her daughter, for her portion ; and after other legacies, he devised the residue of his real and personal estate to A, B, C, D, and E, and their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance, and directed that his trustees should stand seised and possessed of his real and personal estate to the uses of his will, during his wife's life ; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estates, and the lands to be purchased, should be settled to the use of the defendant G. for 99 years ; then to his first and other sons in tail male, &c. J. S. purchased several fee-farm rents, assart rents, and other lands and tenements, and then by a codicil, dated 2d February, 1720, being two days before his death, he recites, that he made a will, dated 1st January, 1711, and then says, " I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L. shall be made up 6000*l.* and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c. to my executors and trustees, in my will named ; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to

the same trusts which I have *mentioned, to devise the manor of H, and the bulk of my estate; and I revoke that part of my will, whereby I appoint A, B and C, three of my trustees, in my will, and I desire K and N to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield decreed, that the will was confirmed by the codicil; that J. S's signing and publishing his codicil, in the presence of three witnesses, was a republication of his will, and both together made but one will; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except the copyhold purchased before his will) did well pass. On appeal to the Lords, the decree was affirmed.

Notwithstanding the codicil in the case last produced, *expressly confirmed* the will, yet the decree of the Court, and the judgment of the Lords, have been considered as standing on the *general* ground, that *every* codicil refers to and acts upon the will, and must, in its nature, not only suppose the existence thereof, but must attract it into a union and incorporation with itself, bringing it down to its own date. And upon the authority of this case, has been built the proposition, that whatever be the apparent purpose of making the subsequent instrument, and whether the subject of its express disposition be real or personal estate, if it import to be a codicil, and have the signature of the testator, and the attestation of three witnesses, agreeably to the directions of the statute, in respect to wills of real property, it will have the effect of republishing the will. This interpretation of the ground of the decree in *Acherley v. Vernon*, seems to be built upon the *general* expression of Lord Macclesfield, in that case, "that the codicil being executed and attested by three witnesses, was a republication of the will; and that they became one will;" and to be sure, this seems the safest and broadest ground for the doctrine to repose upon; for the words of confirmation in the codicil, in *Acherley v. Vernon*, and those declaring the codicil to be part of the will, were only the utterance of the tacit effect of every codicil, which in its very nature supposes *and recognises the existence and operation of the will.

* [408]

That this was Lord Hardwicke's apprehension of the latitude of the case of *Acherley v. Vernon*, is clearly made to appear by

the expressions used by him, in *Gibson v. Lord Mountfort*,⁽ⁿ⁾ where his lordship says, that in *Acherly v. Vernon*, it was the opinion of the judges, that the codicil was incorporated with the will, *which made it a republication*: thence deducing this *general* proposition, that every codicil executed according to the statute of frauds, to whatsoever part of the property it may relate, would be a republication of the will. It was admitted for the heir, said his lordship, that though it is a codicil only to a personal estate, yet if there is a general clause of confirmation of the will, that *that* will make the codicil, duly executed, a republication of the will. But, said the same Chancellor, this will make *every* codicil a republication, if it is executed by three witnesses, though it relates only to personal estate; for a codicil is, undoubtedly, a farther part of the last will, whether it be *said so* or not. But in the *Attorney General v. Downing*,^(o) the Court seemed to be inclined to a *middle* course between the case of *Acherley v. Vernon*, wherein the mere act of making a codicil executed according to the statute, was a republication, and those of *Panphrase v. Lord Lansdown*, and *Lytton v. Lady Falkland*, in which all implied republication was excluded; by requiring an intention to republish to be declared or expressed, or otherwise distinctly manifested, by the testator, in order to give to his codicil that effect. And Lord Chancellor Camden held, that the annexation of the codicil to the will was *one of the modes* by which such intention might be declared, and was *therefore* a republication. And his Lordship seemed to think, that the *expressions* used in the codicil, in *Acherly v. Vernon*, were the foundation of the decree, for the words, he said, were so blended with, and incorporated into the will, that the one could not stand without the other.

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The present doctrine holds every codicil, unless it be confined in expression, a republication of a previous will, if such codicil be executed and attested according to the statute.

*By the settling case of *Barnes v. Crowe*,^(p) the case of *Acherley v. Vernon*, has been set up as the great authority on this subject, to the full extent of the doctrine ascribed to it by Lord Hardwicke, in *Gibson v. Mountford*, as above laid before the reader; and the effect of *annexation* was there denied, as being only parol evidence of a republication, which Lord Commissioner Eyre said, could not be received since the statute of frauds. "If we disentangle ourselves from the rule," said the Lord Commissioner, "that there shall be *no republication* without *re-execution*,

(n) 1 Vez. 492, 3.

(o) Ambler, 571.

(p) 7 Vez. jun. 486.

the principle that a codicil, attested by three witnesses shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will, at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because, by the nature of it, it *supposes* a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three. Before the statute, it was no part of the essence of the republication that the will should be re-executed; any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute," continued the Lord Commissioner, "re-execution of the will is not necessary; nothing more is required than a writing according to the provisions of the statute, expressing that intent."

In the late case of *Pigott v. Waller*, (7) before the present Master of the Rolls, his honour submitted to the authority of *Acherley v. Vernon*, as that case was understood by Lord Hardwicke, in *Gibson v. Mountfort*, and by Lord Commissioner Eyre, in *Barnes v. Crowe*, but not without expressing some disapprobation of the reasonings on which that authority was supported, and a predilection for the old rule, as it stood upon the cases of *Lytton v. Lady Falkland*, and *Panphrase v. Lord Lansdown*; for, said his Honour, a direct republication or re-execution is an *unequivocal* act, making the will operate precisely as if it were executed upon the day of the republication; but a reference to the will proves only, that the deviser recognises the existence of the will, which the act of making a codicil necessarily implies; not that he means to give it any *new* operation, or to do more by *speaking of it*, than he had already done by *executing it*. Why his speaking of it should make the will speak, as it is said, is not very easily discernible, as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first; but can that show that he means it to exist in any *other* form, or with any *other* effect than he originally gave it? But his Honour concluded by saying, that *Barnes v. Crowe*, afforded a certain rule; and if he departed from that, it would only be to set every thing loose again; not to get back to, what he thought better, the *old rule*, for then *Acherley v. Vernon* would be in the way. He was

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therefore disposed, for the convenience of adhering to settled rules, and in deference to former decisions, to hold the codicil a republication.(146)

Of the doctrine of the republication of wills of personal estate.

It is hoped, by this view of the cases, that the progress of the doctrine of republication, as to real estate, is made clear to the reader; I shall say a few words upon the question of the republication of wills of personal estate. In respect to this description of property, the doctrine is said not to have been changed by the statute of frauds; and this appears to have been the opinion of Lord Hardwicke, from the words used by his Lordship in the case of *Abney v. Miller*,^(r) wherein the act of republication insisted upon was, "that the testator, after renewing his leases, being in search for another paper, and the person who was assisting him, having taken up the will by mistake, he said, "this is my will," not meaning thereby to republish, but to show that it was not the paper he wanted. His Lordship observed, that to make it a republication, there must be the *animus republicandi* in the testator, which observation warrants the inference, that he was then of opinion, that if the words used *had been declarative of an intention* to republish, they would have been effectual to produce such a consequence. What will be the weight of this doctrine of Lord Hardwicke, when the point comes directly under adjudication, remains to be seen; but in the mean time, one may be permitted to suggest, that there is a difficulty in conceiving why the clauses of the statute, which affect the publishing of wills, should not also reach to the republication of them.

A republication is a new publication, and if a will can be republished by parol, so as to make it pass property not affected by its original disposition, what is this but making partially, at least, a nuncupative testament, unaccompanied by the forms prescribed by the statute? Before the statute of frauds, we have seen that many of the judges struggled hard against admitting a parol republication of wills of *lands*, as being in contravention of *the statute of wills*, and where the requisites are not observed so as to make good a nuncupative testament, the statute of frauds

(r) 2 Atk. 599.

(146) The codicil related only to personalty, and expressed no intention to republish the will.

has imposed the same necessity for a written declaration of the will in respect to personalty. No subsequent writing can republish a will of land, since the statute of frauds, unless it be executed so as to be itself incapable of passing land according to that statute; why then should a will of personal estate be capable of being republished without the observance of the mode whereby alone a personal will can be rendered effectual?

This branch of my subject may be concluded by observing, that although words are never allowed to have the *effect of republishing a will of lands, (whatever may be the doctrine in respect to personal testaments) yet, where an express or implied revocation has taken place, it has been held, that the will may be set up again by an implied republication, founded upon the destruction of the revoking instrument. As where a testator makes two wills, the latter of which is inconsistent with, or expressly revokes the former, yet if he afterwards destroy the second will, leaving the first in a perfect state, the original will is held to be set up again.^(e) And this seems to rest upon very plain and intelligible grounds; for the first will, being ambulatory during the testator's life, is in existence without any ostensible alteration at the time when its operation is to begin, and that which was to be destructive of its operation, is out of the way at the moment wherein it was to have its destructive effect.

The destruction of the revoking instrument may operate as an implied republication by setting up the original will.

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A laxity of doctrine, in respect to the attestation of wills, seems to have taken an early possession of the courts, for we find it stated by authority, that in the year 1680, where a will, devising real estate, was made in writing, and one of the three witnesses, who saw it published, set his hand to it at another time, it was adjudged good.^(f) And again, in about five years after the statute passed, a will of lands, attested by three witnesses, who at several times subscribed their names, at the request of the testator, but were not present at once together, was decreed good in the Court of Chancery.^(g) I find only one case in which the contrary doctrine was maintained on the bench, and that was at the assizes, by Baron Price, in the year 1717.^(h) The case is thus reported in Viner: A will of land was duly signed by the testatrix, in the presence of A, and also published. A wrote the will, but was since dead; his hand was proved; *after this the testatrix called

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(e) *Glazier v. Glazier*, 4 Burr. 2512. (f) *Freem. Rep.* 486, Anon.
(g) 2 Chan. Ca. 109, Anon. (h) *Vin. tit. Dev.* (N. 10.)

in B, to be a witness to the will ; and told him it was her will, and published it as such ; after this, she called in C, and did the same. The question was, whether these witnesses attesting this will at *several times*, though all in the *presence* of the testatrix, was according to the statute of frauds and perjuries. Baron Price held it ill, for the intent was, that all the witnesses should be together, that one might testify for the other, and this was a ready way to let in fraud and perjury ; for, after the first witness had attested it, there might be a rasure or interlineation in it. To say that this opinion of Baron Price rests on better grounds of reason and law than the contrary determinations which have settled the doctrine otherwise, can hardly be called presumption in the writer, when he appeals to the observations of Lord Chancellor Hardwicke and Lord Chief Justice Willes, in *Ellis v. Smith*, above produced.

That the subscription of the witnesses need not take notice that they attested in the testator's presence.

But though the witnesses, as we have shown above, must subscribe the will in the presence of the testator, it is not necessary that in such subscription notice should be taken of the *fact of its having been done in the presence of the testator*, for this is not in terms required by the statute ; and whether it be so expressed or not, it must be proved to have been so done, to the jury. The leading authority on this subject is that of *Hands v. James*,^(y) where the question on a case reserved on the trial of an ejectment brought by the heir, for the opinion of the court, was, whether it should be left to a jury to determine, whether the witnesses to a will (*being all dead*) did or did not set their names *in the presence of the testator*, and this merely upon circumstances, without any positive proof ; and the court thought that it was a matter fit to be left to a jury : for they said, the witnesses, by the statute of frauds, ought to set their names in the presence of the testator, but it was not required by the statute, that this should be taken notice of in the subscription to the will ; and whether **inserted* or not, it must be *proved* ; and if inserted, it does not *conclude*, but may be proved *contra*, and the verdict may find *contra*. Then if not conclusive *when inserted*, the *omission* would not conclude on the *negative* side, and therefore, *it must* be proved by the best proof the nature of the thing was capable of. And they further said, that in case the witnesses were all

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(y) Com. Rep. 531, et seq.

dead, there could not be any *express* proof, since, at the execution of wills, oftentimes none are present but the deviser and witnesses. The proof must, therefore, as in other cases, be circumstantial; and there were sufficient circumstances in the case, 1st. Three witnesses had set their names, and it must be intended they did it regularly; 2d. One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary. And the question being a matter of fact, it ought to be left to the jury, as was the question whether livery was given in a feoffment, where no livery was indorsed; and whether a deed was executed, where the counterpart only was produced.

To the same effect was the case of *Croft v. Paulet*(z) where the words of the attestation were "signed, sealed, published, and declared, as and for his last will, in the presence of us, A, B, and C." And it being objected, that the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one; the court, on the authority of the case of *Hands v. James*, above cited, said it was evidence to be left to a jury, with all the circumstances; and a verdict was given for the will.

The same point was decided in the same way a few years before, by Lord Chief Justice Willes, and the rest of the Court of Common Pleas, in the case of *Brice v. Smith*(147) where also the witnesses were all dead.

(z) 2 Strange, 1109.

(147) Willes' Rep. 1. Com. Rep. 539, S. C. But the report in Comyns seems to be a little inaccurate, in saying, that nothing but the names of the witnesses were subscribed; the attestation being expressed in the same words as in the above-mentioned case of *Croft v. Paulet*, "signed, sealed, published and declared, by the said testator, to be his last will and testament, in the presence of us," &c. See the note of the editor, Willes, 4. (b)

*PART IV.

Of the qualification of the witnesses.

IT seems now time to speak of the quality and capacity of the witnesses, who, by their attestation, are necessary to give effect to a will of real estate, under this statute. In Hudson's case, reported in Skinner,^(a) it was proved that the witnesses had been dealt with; upon which it was urged by the counsel, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute; to which Chief Justice Pemberton answered, that if there were three witnesses to a will, whereof one was a thief, or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will. By which it should seem, we ought to understand his Lordship to mean, that if there was nothing at the time of the attestation to impeach the competency of the witnesses, they must be regarded as credible witnesses at that time, within the proper interpretation of the word *credible*, as used by the statute. But if a witness be *convicted* of felony, and so rendered infamous, at the time of his subscribing the will, it seems not to have been doubted, but that the will was invalid, for defect of a sufficient attestation.

What offences disqualify.

Crimes which stigmatize a man with infamy, when convicted thereof, such as treason, felony, conspiracy at the suit of the crown, perjury, forgery, barratry, attain of false verdict, and disqualify him for giving evidence upon a trial in a court of justice, repel him also from becoming a subscribing witness to a will, to the effect of satisfying the statute *by his attestation.^(b) It seems, indeed, to have been formerly a notion, that every offence for which a man had been caused, or even sentenced to be set in the pillory, on account of the infamy of the punishment, rendered him incapable of giving testimony;^(c) but more modern cases have established the law in this particular on a more sensible foundation, by making the infamy of the *crime* only, and not the infamy of the *punishment*, the ground of the disqualification; and according to the present doctrine, persons who have suffered an infamous punishment, unless the

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That it is the infamy of the offence, and not of the punishment, which disqualifies.

(a) 79. (b) Com. Dig. tit. Temoigne, A. 2. (c) Co. Litt. 6. b.

offence for which it was inflicted on them, was of the species of *crimen falsi*, or other crime of an infamous nature, are not disabled from giving their testimony in a court of justice, however much their credit with the jury may be affected by such a fact. Before the statute of the thirty-first of this King, (d) persons convicted of petit larceny, were judged not to be credible witnesses to attest a will under the statute of frauds. And in the case wherein this was held, the rule was also laid down in strong and clear terms, that it is the crime and not the punishment which makes a man infamous, and vitiates his testimony. (e)

If a man be sentenced to the pillory for a treasonable libel, or slanderous words on government, he is not disqualified for becoming a witness in court, and is therefore a credible witness to a will; but if he be convicted of barratry, which is an *infamous offence*, though he be sentenced only to be *fined*, he is rendered incompetent as a witness in court, and unqualified, it is conceived, as a *credible* witness, to attest under the statute. (f)

Idiots and madmen, and children under the age of common knowledge, who are incapable of discerning or estimating truth, are clearly in a state of legal incompetency to prove a fact, and therefore, can never be regarded as capable of attesting a will, so as to answer what the statute intends by such attestation. And generally, I apprehend, it may safely be concluded, that whatever incapacitates a man as a witness at common law, is an objection to the sufficiency of his attestation as a credible witness, within the meaning of the statute; for '*credible*,' in the place in which it stands in this statute, cannot well be received in any other sense than '*competent*;' the word in its popular sense being incapable of any constant test or standard, according to which a testator could make his choice of witnesses with any confidence in the validity of their attestation. Upon the same principle, if the competency, having been lost, has been restored before the attestation, the credit required by the statute has also been re-established, and the attestation will be good. Thus the King's pardon, after a conviction of perjury, or other

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The word '*credible*,' as it is used by the statute, must be understood in the sense of competent.

(a) By stat. 31 Geo. 3, c. 35, it is enacted, that no person shall be an incompetent witness, by reason of a conviction of petit larceny.

(e) *Pendock v. Mackinder*, Wills, 665. 2 Wils. 182. And see *Rex v. Ford*, 2 Salk. 690. 5 Mod. 15. (f) *Chater v. Hawkins*, 3 Lev. 426. *Rex v. Ford*, 2 Salk. 690.

offence at common law, qualifies the party to attest a will, though, as it should seem, it would be otherwise in the case of a conviction of perjury, on the statute of 5 El. c. 9.(148) And such restoration to competency would come too late, as I humbly apprehend, between the time of attestation and examination in court.(149)

(148) If a man be convicted of perjury upon the statute, he cannot be restored to credit by the King's pardon; for by the statute it is part of the judgment, that the convict be infamous, and lose the credit of his testimony; nothing, therefore, but a reversal of the judgment, or a statute pardon will, in that case, suffice to restore the competency. *Rex v. Crosby*, 2 Salk. 689, and *Rex v. Ford*, *ibid*, 690. 3 Salk. 155.

Of the qualification of the attesting witnesses in the civil law.

(149) By the laws of the empire, those persons only were capable of attesting a will, who were themselves legally capable of making a testament. No person under puberty, or insane, or mute, or deaf, or prodigal interdicted the use of his own property, or such as the law had judged reprobate or infamous, or had rendered intestable, could be admitted as witnesses to a will. I. 2. 10. 6. D. 28. 1. 20. Neither could women be witnesses to regular or perfect wills: the law admitting them in all matters, whether civil or criminal, when the nature of the case was such, that other evidence could not be attained, but not when there was a choice of testimony, as in making wills, and solemnising other public acts: their testimony was admitted in proof of a fact, but not to give validity to a solemn instrument. See this particularity of the civil law explained, and the whole of this title of the Institutes '*qui testes esse possunt*,' well commented upon by Vinnius, edit. Hein. 297.

The witnesses by the civil law must be credible, and idoneous, at the time of the will's being made, and according to the humanity of that system, as well as of our own, every one was presumed to be fit as a witness, unless the contrary was made to appear. D. 22. 5. 2. It is to be observed too, that *all* the witnesses ought to be fit, or *idoneous*, for the whole will was rendered null and void by the insufficiency of *any one* of the witnesses. C. 6. 23. 12. unless a codicillary clause were added, that if it were not valid as a will, it should be valid as a codicil. If a madman attested in a lucid interval, his attestation was good, and so was that of a prodigal, if, before attesting, he had returned *ad bonos mores*. The integrity and freedom of the witnesses was a great point in the imperial law; insomuch, that no person could be a witness to a testament, who was under the power of the testator; and though any number of persons might be admitted witnesses out of the same family, to a will in which the family was

*By the law of Rome, no *heres scriptus*, or appointed heir, could be admitted a witness to the testament by which he was so appointed; neither could the testimony of any one who was in subjection to such heir, nor of his father, to whom he himself was in subjection, nor of his brothers, if they were under the power of the same father, be admitted; but the testimony of legataries, and of those who were allied to them, or in subjection to them, was admissible^(g) which was a doctrine, not perfectly agreeable to the *general rule* of the civil law, that no one should be permitted to give testimony in his own cause;^(h) nor is the consistency of that rule saved by the reason given for the admission of such testimony, *viz.* that legataries were particular and not universal successors, and that a testament might be valid without them; whereas, the appointment of an heir, was of the essence and constitution of a perfect testament,⁽¹⁵⁰⁾ and formed the principal feature of distinction between that and a codicil⁽¹⁵¹⁾ or a *donatio causa mortis*.

(g) I. 2. 10. 10. 11. (h) Cod. 4. 20. 10.

not interested, yet, if a son of a family gave away his military estate, or *peculium*, after leaving the army, neither the father, nor any one under the power of the father, could be a witness to the testament. In apology for which rules of exclusion, the extent of the paternal authority among the Romans should be remembered; and, indeed, so adjusted to one another do the several parts of the system of the Roman jurisprudence appear to be, that, it seems, the student will have considered them with little advantage in a view to the illustration of such of our own laws as have been copied therefrom, or are in affinity therewith, unless he have found time and possess curiosity to make that great work of human policy an entire and consecutive branch of his studies.

(150) The exactest definition of a Roman testament has been thought to be this—the appointment of an executor or testamentary heir, made according to the formalities prescribed by law. Domat. lib. 1, t. 1, sect. 1; and vide D. 28, 5, 1.

(151) There is no difference in our law, as to publication, between codicils and wills: but codicils are said by Justinian, *nullam solemnitatem ordinationis desiderare*: which Vinnius comments upon with disapprobation, as not being consonant to the Theodosian code; and complains of the *jejuna quorundam distinctio inter solemnitatem ordinationis et probationis*. Heineccius, however, maintains the distinction thus: *In testamentis condendis testibus opus erat talibus quibuscum olim fuerat testa-*

Of the rule of the spiritual and common law courts, where the witness was a legatee or devisee.

*In the spiritual courts of this kingdom, to which the sole cognisance of the validity of wills belongs, where they relate to personal estate, no legatee, can give his testimony in *foro contradictorio*, in support of the validity of the will, till he has released his legacy or received the value thereof, and in case of payment, the executor of the supposed will must release all title to any future claim upon such legatee, who might otherwise be obliged to refund if the will be set aside; and the release is always made to the intent, that the legatee may have no shadow of interest at the time of making his deposition.⁽ⁱ⁾ The same rule prevailed in our courts of common law with respect to the inadmissibility of the testimony of a devisee or person benefited under a will of real estate, to establish its validity: and it appears from the case of *Anstey v. Dowsing*,^(k) that, if a legatee, who was a witness to a will, refused either to renounce or to receive a sum of money in lieu of his legacy, he could not be compelled by law to divest himself of his interest, and while his interest continued, his testimony was useless.

J. T. made his will, by which he disposed of his real estate, and gave to one J. H. and his wife, 10*l.* each for mourning, with an annuity of 20*l.* to E. H. the wife of J. H. The will was attested as the statute directs, by three witnesses, whereof *J. H. was one. The legacies, and satisfaction for the annuity were tendered and refused. And the question upon the special verdict was, whether, or not, the will was well attested according to the statute of frauds. The judges of the King's Bench were unanimously of opinion, that a right to devise lands depended upon the

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(i) Vid. Harris, Inst. Just. lib. 2, tit. 10, s. 11. (k) *ibid.*

menti factio in comitiis calatis, quia is actus jure vetustissimo lex erat populi suffragiis perlata, jure novo solemnitas mancipatio hereditatis. Omnia ergo hic solemnia. At codicili erant epistole. Quis epistolis testes adhibet? quis in iis solemnitatem requirit? valebat hujusmodi epistola, etiam non obsignata, dum de ejus fide constaret: quia enixe voluntatis preces ad omnem successionis speciem porrecte videbantur. Testes ergo adhibebantur ab iis, qui nuncupative fidei committebant. Postea autem in scriptis codicillis intestatorum testium opus erat presentia per L. 1. C. Theod. de test. et codicill. non solemnitatis causa, sed ut testantium successiones sine aliqua capitione serventur. Ergo non solemnitatis causa adhibendi, sed probationis causa. Nec aliud voluit Theodosius dum in omnibus codicillis testes requirit. Vin. Com. lib. 2, tit. 25.

powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the deviser: that these were checks to prevent men from being imposed upon: and certainly meant that the witnesses to a will (who are required to be *credible*) should not be persons entitled to any benefit under that will. And that, therefore, J. H. was not a good witness.^(l)

It seems also, that the question was started in this case, whether a benefit to a witness at the time of his attestation, should annul his testimony, though at, or after the testator's death, he should become disinterested by a release of his legacy, or the receipt of the value thereof, and that it was held, that the condition of the witness, *at the time of his attestation*, must be regarded; and that if interested *then*, he could not be a good witness. The doubts and objections agitated in this and in other cases,^(m) occasioned the statute 25 G. 2, c. 16, to be passed, whereby the contests concerning the force and obligation of the word '*credible*,' in respect to the attestation of persons benefited under the will, were finally composed.

The curious student, however, whose search is after general principles, and topics of legal discussion and discrimination, will, notwithstanding the removal of the practical necessity for the inquiry, still recur to the perusal of Lord *Mansfield's⁽ⁿ⁾ and Lord Camden's arguments^(o) on the opposite sides of the question, concerning the import and exigency of the words '*credible witnesses*,' used by the statute. He will find Lord Mansfield strenuously of opinion, that though a witness might be entitled to a benefit under a will at the time of the attestation, yet, if he became disinterested *before his examination*, his testimony was restored, and the will was supported by his attestation. In his Lordship's judgment, the word '*credible*' could have no meaning beyond '*competent*,' without leading to great absurdities; and in this general exposition of the word, Lord Camden coincided, but their difference was this: Lord Mansfield would understand '*competency*' to imply nothing more than what was *tacitly contained in the word witness by itself*, (no man being a witness unless he is competent

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Of the opposition in sentiment between Lords Mansfield & Camden, on the import and exigency of the word '*credible*' in the statute.

(l). *Strange*, 1254. (m) *Hilliard v. Jennings*, Com. Rep. 91; and 7 Bac. Abr. edit. Gwyllim, 329. Price v. Lloyd, 1 Vez. 503. 2 Vez. 374. (n) *Windham v. Chetwynd*, 1 Burr. 414. (o) *Hindon v. Kersey*, 4 Burn. Eccl. L. 97.

to give his testimony) so that it appeared to his Lordship (152) that the competency was to be seen and judged of *at the time, and with reference to the time of examination in court.* Whereas, according to Lord Camden, the *credibility*, i. e. *competency*, must be regarded as it stood at the time of the attestation. By Lord Mansfield's explanation of the force of the word *credible*, it became a dead letter, and, therefore, his Lordship reduced himself to the necessity of supporting his argument, by supposing the word '*credible*,' to have slipped in through the inadvertency of the framers of the statute, which he denied to be the production of Lord Hale, any further than, *perhaps, as being compiled from some of his loose notes, unskilfully digested. (153)

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His Lordship adverted to the rule of testimony in the Ecclesiastical Courts, and at the common law, where a release, payment, or tender, made the testimony of the witness good. Nice objections of a remote interest, which could not be paid or released, though they hold in other cases, were not enough to disqualify a witness in the case of a will. Thus, parishioners, he said, might prove a devise to the poor of the parish forever. Interest was no positive disability ; it only afforded a *presumption of bias*, and on that ground rendered a witness incompetent ; but still it was *only presumption*, and presumptions only stood till the contrary was made apparent ; if the bias were removed, the presumption ceased. That nothing could be more reasonable than to allow this objection of interest to be purged *by matter subsequent to the attestation*, and previous to the trial.

Lord Camden, on the other hand, in the case of *Hindon v. Kersey*, argued, that the word '*credible*' imported a *necessary and substantial* qualification of a witness *at the time of his attestation.* And that if the witness was incompetent *at that time*, nothing *ex post facto* could restore the validity of his attestation ;

(152) In the subsequent case of *Hindon v. Kersey*, it is stated, that Lord Mansfield, previous to his delivering his opinion in *Wyndham v. Chetwynd*, declared that *it was his own*, and that he was personally answerable for all its errors ; the judgment of the court being *general*, that they held the will duly executed according to the statute.

(153) I have ventured to answer this opinion in my preface, by the mouths of the greatest chancellors and judges, before and since Lord Mansfield's time.

neither could such devisee or person, taking a benefit under the will, be received as a witness for other devisees under the same will : the objection was irremovable, and the *whole* instrument, as far as it concerned real property, was void. He was of opinion, that the novelty introduced by the statute was the *attestation*, the method of *proving* which, was left standing upon the old common law principles ; as that one witness might prove what all the three had attested, and, though that witness must be a subscriber, yet that was *owing to the general common law rule, that the best evidence must be produced. He considered, therefore, that the statute had principally in view the *quality* of the witnesses *at the time of the attestation*. (154) That a will was the only instrument which required to be attested by subscribing witnesses at the time of execution : while leases, marriage agreements, declarations, and assignments of trusts, were only required to be in writing and signed. Those were all *transactions of health*, and protected by valuable considerations, and antecedent treaties. The power of a court of equity was thought sufficient to meet every fraud that could be practised in those cases ; but a will was often executed suddenly in a last sickness, and sometimes in the article of death ; and the great question to be asked in such case was this—was the testator in his senses when he made the will ? (h) and consequently the time of the execution was the critical minute which required guard and protection.—An act so solemn, and often calling for a laborious recollection and investigation, executed at such a time, was pregnant with suspicion : what then, his Lordship said, was the employment of the witnesses ? It was to inspect and judge of the testator's sanity before they attested, and if he was not capable they ought to refuse to attest. In other cases, the witnesses were *passive* ; here they were *active* ; and in truth, the principal parties to the

(p) Vid. Doc. on Dem. Walker v. Stephenson, 3 Esp. Ni. P. Ca. 284.

(154) In *Brograve v. Winder*, 2 Vez. jun. 636, an objection was taken to the competence of one of the witnesses to the will, as being interested at the time of his examination ; but as he had no interest at the time of the execution of the will and death of the testator, the Lord Chancellor, without argument, held him to be a good witness.

transaction. THE TESTATOR WAS INTRUSTED TO THEIR CARE. The design of the statute was to prevent wills from being made, which ought not to have been made, and *always operates silently by intestacy*. It is true, continued the Chief Justice, the design of *the statute was to prevent fraud; and though no suspicion of fraud appeared in the case before him, *yet the statute had prescribed a certain method*, which every one ought to pursue to prevent fraud.(g) As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to leave the rule inflexible, than to permit it TO BE BENT BY THE DISCRETION OF THE JUDGE.

Thus, I have endeavoured to compress into a small compass, for the reader, the principles upon which these great judges mainly relied in their opposite views of this arduous question. He will perceive, that both the cases of Wyndham v. Chetwynd, and Hindon v. Kersey, came before the respective courts, after the statute 25 Geo. 2, viz. the former in *Michaelmas* term, 31 G. 2, the latter in *Easter* term, 5 Geo. 3; but the wills in both the cases were made before the last-mentioned statute was to have its operation of making void the beneficial interest given by the will to the person becoming a subscribing witness thereto, and, therefore, those cases could only come under the third section of that statute (if at all) which provided for the case of wills made before the 24th of June, 1752, and this clause makes mention only of a legacy or bequest, and extends only in words to the immediate object of such legacy or bequest. Neither the case, therefore, of Wyndham v. Chetwynd, being that of a creditor of the testator becoming a subscribing witness to his will, which charged his debts upon his real estate; nor that of Hindon v. Kersey, in which there was a devise of the testator's lands to trustees to dispose of the rents to the poor of a township, (the subscribing witnesses being seised of property in the township assessed to the poor rate) were within the third section; and, consequently, they were not either of them within the statute. The circumstances of which cases would, however, were they now to happen, clearly bring them respectively within the first and second sections of the above-mentioned *statute of George the Second. This great question is, therefore, now at rest to all practical purposes, and remains only a subject of curiosity, on which, as such,

(g) Vid. *Lea v. Libb*, Carth. 37; the words of the court.

a great incidental importance is reflected, by the exercise they have given to two of the finest intellects which have adorned the bench of justice, in the maintenance of a most solemn and diametrical opposition of argument.

We cannot but observe, however, that, although Lord Mansfield was supported by all his brothers, and Lord Camden was overruled by those who sat with him, the legislature showed their sense of the subject to agree with the policy and principles of Lord Camden's reasoning, by extinguishing the interest of the subscribing witness, whatever it might be *at the moment of his attestation*. By this provision of the legislature by their second act, they seem to have declared their intention by the first; and still, in their alteration of the law, regarding the time of the attestation as the critical juncture to which the qualification related, they have made the interest of the individual a sacrifice to the will.

An attentive consideration of what has been above laid before the reader will, it is hoped, enable him to peruse a statute with intelligence, the true spirit whereof, without a display of the state of the controversy which gave it birth, might not so easily present itself. That it may be read and considered by the student with the more advantage, by falling into the train of those ideas which have been already given him by what has gone before, I have thought it best to copy out the whole act, and insert it immediately after the statute of frauds and perjuries, which it seemed likewise advisable to introduce entire at the end of this volume, for the greater facility of reference.

•PART V.

• [427]

WE come now to consider the constructions put by the courts of justice upon the words of the statute, requiring the subscription of the witnesses *to be made in the testator's presence*.

Upon a feigned issue, tried in the court of Common Pleas, the question was, whether the will was made according to the statute of frauds? for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. The Court said, the statute required attesting in his presence, to prevent obtruding another will in the place of the true one. It

Of the words requiring the subscription of the witnesses to be in the testator's presence.

That it is enough if the testator might see the witnesses whether he did actually

see them or not. is enough if the testator *might* see, it is not necessary that he *should actually see them* signing ; for, at that rate, if a man should turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator ; he *might* have seen it, and that is enough. And they compared it to the case, where the testator lay sick in bed, with the curtain drawn, (r) while the witnesses subscribed.

On a trial at bar, where the question was, whether the witnesses to a will had pursued the directions of the statute of frauds, in their modes of subscribing their names, it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he *might* see them subscribe their names if he would, though there was no positive proof that he *did* see them subscribe their names, there was a sufficient subscribing within the meaning of the statute ; because, *it was possible* that the testator *might* see them "subscribe ; and, therefore, the court held, that if the witnesses subscribed their names in the same room where the testator lay, though the curtains of the bed were drawn close, it was a good subscribing within this statute. (s) (155)

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A similar doctrine to that which we have shown to have been maintained in the courts of law, was adopted by Lord Thurlow in the court of Chancery, in a case circumstanced as follows : (t) Honora Jenkins, having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and

(r) *Shires v. Glascock*, 2 Salk. 688. (s) *Davy and Nicholas v. Smith*, 3 Salk. 395. (t) *Casson v. Dade*, 1 Bro. C. C. 99.

(155) The notion of the civil lawyers was more rigid and cautious in this respect. The attestation ought to be in *conspetu testatoris* ; and further, *non est satis, ut quidam tradiderunt, testes oculos esse, si testatorem ipsi non videant, forte velo aut cortina interjecta conspectum adimente, licet vocem ejus audiant : sed necesse est ut faciem ejus videant, ne qua fraus fiat alio forte subornato, qui vocem testatoris imitando simulat.* *Vinn. Com.* 1, lib. 2, tit. 10. And Vinnius was of opinion that a *blind man* (de quo nihil traditum est) could not be a witness, because he could not satisfy the law, which required that the testator should be seen by the witnesses, and that they should be able to recognise the testator's signature. This point may make a *quære* in our own law.

went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution they returned into the office to attest it; and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witness took the will to her, which she folded up and put into her pocket. The Lord Chancellor inclined very strongly to think the will well executed, and the above-mentioned case of *Shires and Glascock*, 2 Salk. 688, was relied upon as an authority. Mr. Arden pressed for an issue, but, finding the Lord Chancellor's opinion very decisive against him, he declined it.

*In *Broderick v. Broderick*,^(u) where the testator devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, who went down stairs into another room, and attested the will there, which was *out of the presence of the testator*, the relief afforded to the heir against a release obtained from him by the devisee, under a false assurance that the will was sufficiently executed, was a necessary consequence of the opinion of the Chancellor,^(x) that the devise was void for want of an execution conformable to the statute. And it was in vain contended for the devisee, that the will, as to the deviser, was *executed*, and that the form of the witnesses subscribing in the presence of the testator, was only prescribed by the statute of frauds, to prevent a rash disinherison of the heir: but that since the execution of the will was fully proved, though the circumstances required by the statute had not been observed, yet, it was the plain intention of the testator, that the devisee should have the estate; and that the devisee having the legal estate, it would be hard to take it from him in equity, and by those means to dispose of the estate against the intent of the testator, from the devisee, for want of a ceremony, when the *end* of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Nor will the subscription of the witnesses in the *same room* always accomplish the intention of the statute, or necessarily imply it to be in the testator's presence, for, as was observed by

(u) 1 P. Wms. 239.

(x) Lord Harcourt.

Lord Chancellor Macclesfield, in *Longford v. Eyre*(y) it might be done in a corner of the room in a clandestine and fraudulent way, and then it would not be a subscribing in the testator's presence. But his Lordship further said, that as it was sworn by the witness, that he subscribed the will at the testator's request, and in the same room, that could not be fraudulent, and was well enough.

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*Thus, therefore, the law upon this subject seems sufficiently settled upon this distinction, that if the attesting witnesses subscribe the will in such a situation with respect to the testator, as that it was not possible for him to have seen the act done by them, such will is void as to real estate for the defect of solemnity in its execution ; but if their situation was such as to afford the testator the opportunity of seeing them subscribe, if he chose, their attestation under such circumstances will be good and valid, although in point of fact they were not seen by the testator in the very act of subscribing their names.

It is not enough that the testator is corporally present, he must possess his faculties so as to give him a mental knowledge of the fact.

The mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point ; for there must be a mental knowledge of the fact, so that, as a subscription clandestinely made in a corner of the same room with the testator, was not on this account a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone so as to constitute it an act done without his knowledge. On this principle was founded the decision of *Right v. Price*(z) in which case, the form of an attestation was written on the second sheet, and they put their names to it in the room where the testator lay, but he was in a state of insensibility.— And the question was, whether this will was duly executed for passing lands according to the statute of frauds ?

In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, whether the testator, having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be

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set aside, because a formality required, *according to an implied

(y) 1 P. Wms. 740.

(z) Doug. 241.

intention of the legislature, had not been complied with ; that it did not appear but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names ; which, according to the law, as laid down in Shires and Glascock, would have been sufficient.

But the court said, that they would lean in support of a fair will, and not defeat it for a slip in form, where the *meaning* of the statute had been complied with ; this was the principle of Shires and Glascock's case, and other cases of that sort. But the case then before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental qualities. That it was usual, in precedents of wills, to say, that the witnesses subscribed at the request of the testator ; that, indeed, was not expressly required by the statute, but the practice showed the general understanding, and that the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case, the testator could not know whether the will that he had begun to sign was that which the witnesses attested ; he was dead to all purposes or power of conveying his property.

I do not know that it has ever been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his hand-writing to the attestation, would be sufficient. In the case of *Risley v. Temple*,^(a) the facts were, that the testator, lying sick in bed, made his will, and signed, sealed, and published it, in the presence of three witnesses, but being tired, ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names, and then returned and owned their names to the testator, who looked upon the will, and said, '*they have done well.*' But this point was not spoken to in the case according to the report.

Whether an acknowledgment by the subscribing witness to the testator would be sufficient.

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It seems very plain, however, that to hold such an acknowledgment sufficient, would be in direct opposition to the words of the statute, which, though it does not by the 5th section require

(a) Skin. 107.

the signature of the testator himself to be in the presence of the witnesses, does yet expressly direct the subscription of the witnesses to be in the testator's presence ; and therefore, this part of the ceremonial does certainly seem to preclude the same latitude of construction which has been applied to the act of the testator himself. And it seems little to be doubted, but that, agreeably to the greater spirit of tenderness for the words of the statute, which now seems to prevail in our courts of justice, such an acknowledgment by a subscribing witness, of his hand-writing to the attestation, made to the testator, after making the subscription out of his sight and presence, would be deemed an insufficient compliance with the requisition in this respect made by the statute.

That the witnesses may subscribe at different times.

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It has been shown, that a testator may write, and we shall now make it appear from the authorities, that he may publish, his will at different times ; or, in other words, that an attestation made by the witnesses respectively at three different times, if in the presence of the testator, satisfies the law. (156) The *two

(156) It may be interesting to compare our own with the civil law upon this article. In an early period of the Roman jurisprudence, it was held, that a testament ought to be made *uno contextu*, without any foreign act intervening, and the witnesses were likewise required to attest, without separating, or even discontinuing the act of subscribing, till all was complete. And, indeed, it does not seem that the witnesses were ever released from the necessity of subscribing at one time and in each other's presence. In favour, however, of certain unavoidable interruptions, the Emperor Justinian limited and explained the generality with which the rule had been expressed. In the Sixth Book of the Code, tit. 23, 28, the qualification of the doctrine is thus propounded : *cum antiquitas testamenta fieri volueris nullo actu interveniente, et hujusmodi verborum compositio non rite interpretata pene in perniciem, et testamentum et testamentorum processerit : sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quadam dispositio secundum pristinam observationem celebratur (nihil enim ex ea penitus immutandum esse censuimus) ea quidem que minime necessaria sunt, nulla procedere modo, quippe causa subtilissima proposita ea que superflua sunt minime debent intercedere. Si quid autem necessarium evenierit, et ipsum corpus laborantis respiciens contigerit, id est, vel victus necessarii, vel potionis oblatio, vel medicaminis dabo, vel impositio, quibus relictis ipsa sanitus testatoris periclitatur, vel si quis necessarius natura usus ad depositionem superflui ponderis imminuat, vel testatori vel testibus, non esse*

leading cases to establish this point, are, *Cook v. Parsons*, (b) and *Jones v. Lake*. (c) The first of which cases was decided *upon a bill of review to reverse a decree of Lord Nottingham in 1682, for a sale of lands subjected by the will to the payment of debts; the lands were devised by the testator to trustees, and their heirs, to set and to farm let, and out of the rents (without saying profits) to pay his debts; and all his debts and legacies being first paid, he gave the surplus to F. S.

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This will was written with the testator's own hand, as was proved; and was published in the presence of three witnesses, at three several times, and they all attested it in his presence, but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest

(b) Prec. Ch. 185.

(c) 2 Atk. 176.

ex hac causa testamentum subvertendum, licet morbus comitialis, (quod et factum esse comperimus) uni ex testibus contigerit; sed eo, quod urget et imminet, repleto, vel deposito, iterum solita per testamenti factionem adimpleri. Et si quidem a testatore aliquid fiat testibus paulisper separatim, cum coram his facere aliquid naturale testator erubescat iterum introductis consequentia factionis testamenti procedere.

The phrase '*uno contextu*' is not to be understood as relating to the composition of the will, (which it seems might be taken up and prosecuted at intervals, according to the necessary interruptions of business, and as the leisure of the party allowed; as was said to be the law with us, in *Carleton v. Griffin*, above cited) but to the mode of publishing and solemnizing the will, by the formal *nuncupatio testamenti*, or *declaratio voluntatis* to the witness, with the ceremonies of subscribing and sealing by them, and the signing by the testator, which ought all to be done at one time, that is to say, *uno actus contextu*, without the intervention of any act or business foreign to the purpose, which the parties were met together upon, which, unless it happened on the natural and necessary occasions alluded to in the passage from the code above extracted, would vitiate the testament, as being inconsistent with the solemnity of its celebration. Thus Vinnius translates '*uno contextu*' into the Greek by '*mia 'uphe*, and *adialeptos*, as being applicable not to the composition of the will, but to the publication of it; which is plainly the sense of it, as it stands accompanied in the text of the institutes, "*et testes quidem eorumque presentia, uno contextu, testamenti celebrandi gratia,*" &c.

the will, as was proved by that witness. The testator died, leaving an infant heir, and the land was decreed to be sold, and no day given the infant to show cause against it. One of the objections to the decree was—that this was no good will within the statute of frauds and perjuries, because not attested by all the witnesses at *one time*, and that one of them did not see the testator sign, but only hear him own that it was his hand.

But the Lord Keeper held a publication of a will before three witnesses, *though at several times*, to be sufficient, and thought the writing the will with the testator's own *hand*,⁽¹⁵⁷⁾ a sufficient signing within the statute, though not subscribed nor sealed by him, but doubted whether acknowledging the subscription to be his own would suffice.⁽¹⁵⁸⁾

In *Jones v. Lake*, the case upon the special verdict was thus—the testator signed and executed his will in December, 1735, in the presence of *two witnesses*, who attested the same in his presence; afterwards, in the year 1739, he with his pen went over his name, in the presence of a *third witness*, who subscribed his name *in the testator's presence*, and at his request. And the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend *they should be all present together*; otherwise, there was not that degree of evidence which the statute requires; for an attestation of three witnesses, at different times, *has only the weight of one witness*. Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time *two witnesses* attest, and insane when the *third* attests. It cannot be considered as a will, till the third witness hath signed, for that completes the act. The will was dated in 1735; suppose lands to be purchased after the date, and before the attestation by the third witness, would the lands pass? certainly not.

(157) According to the Code 6, 23, 28, the writing of the will with the testator's own hand, dispensed with his signing; but it was added as a condition, *et hoc specialiter in scriptura reposerit, quod hoc sua manu confecit*; but it dispensed with no other solemnity.

(158) This question has been already sufficiently discussed.

On the other hand, it was argued for the devisee, that the will executed before three witnesses, *though at three different times*, was good ; the statute not requiring they should *all* be present at the *same* time. That the requisites under the *statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act did not mention, and in effect be making a new law.

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The Lord Chief Justice Lee said, the case depended upon the words of the statute. The requisites in the statute were, that *three witnesses should attest his signing*, but it did not direct that the three witnesses should be *all present at the same time*. Here, said the Chief Justice, you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. Judgment was accordingly given against the heir at law.

The judges, in the case of *Ellis v. Smith*,^(d) admitted the authority of these cases, and drew from them an inference in favour of the validity of the testator's acknowledgment to the witnesses of his hand-writing to the signature of the will. "To strengthen the authorities I have already mentioned, said the Lord Chief Baron Parker, I shall take notice of the cases which allow the witnesses to subscribe at different times ; and I think they support the admission of the declaration in question ; since the testator is not supposed to run over his name before every witness, but having signed before one, to *acknowledge* it only before the rest.⁽¹⁵⁹⁾ The same conclusion *was drawn by Lord Chancellor Hardwicke, Sir John Strange, Master of the Rolls, and Lord Chief Justice Willes. The last of whom observed, that the au-

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(d) 1 Vez. jun. 11.

(159) In *Jones v. Lake*, the last case produced, the testator did run over his name again ; but the principle of the decision implied the sufficiency of an attestation, made at three distinct times.

thorities not in point supported the decree more strongly than those in point, for they allowed the attestation and subscription of the witnesses at different times to be good ; and the testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two. And in the opinion of the Master of the Rolls, to permit the witnesses to attest at several times, was to admit the asseveration of the testator that it was his will, to be equivalent to signing it before the witnesses ; to which Lord Hardwicke added, that he differed from those who thought that the cases which had been mentioned, only supported the case before the court, by consequential reasoning ; he thought them directly in point.

It is to be observed, however, that these decisions, in the opinion of the whole court, went too far, and opened the way to frauds, and particularly the Chief Justice observed, with great force, that " he had known one man swear, that he did not see the testator sign, and the other two swear that he signed it before the three ; so might one man swear, that when he attested the will, the testator was insane ; another, that he was sane ; and thus an inlet was given to great frauds and impositions. But when they attested it *simul et semel*, they were a check upon each other, and such frauds were prevented ;(160) nay, said his Lordship, I

(160) This was certainly the doctrine of the civil law, from which the framers of the statute in question borrowed, in making this provision for preventing the forgery of wills. We have shown that the words 'uno contextu' related to the complex ceremony of publication, which was necessary to be done by a *continued* act. The attestation, therefore, which was an essential part of the publication, was necessary to be done by the witnesses, *simul et semel*, at the same time, at the same place, and in sight of each other ; not meaning, of course, by the *same* time, *eodem instanti*, but *uno actus contextu*, at one juncture, without break or interruption,† as the text of the Code 6, 23, 21, well explains, distinguishing at the same time between the act of making, and that of celebrating and publishing the will, to which last mentioned act the words 'uno contextu' are shown to be only applicable. *In omnibus autem testamentis, quæ presentibus vel absentibus testibus dictantur superfluum est uno, eodemque tempore exigere testatorem, et testes adhibere, et dictare suum*

† All solemn legal acts and ceremonies were necessary, by the civil law, to be executed without interruption, the common phrase to express which was, 'uno contextu absolvi.'

think a *parol* *disposition before three, full as solemn an act as a will in writing, attested by three *separatim*." He admitted, however, that the decisions were the other way, and that the point was established.

*PART VI.

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IT has been already made to appear, that a will of lands may be sufficiently established in a court of justice, as to the testator's signature, by proof of his acknowledgment thereof. It will be proper now to consider, what is sufficient *proof* of the due *attestation* of such a will, according to the directions of the statute. We have seen that in a case of authority, upon a question before the court, whether or not it should be left to a jury, to determine as to the fact of a due attestation in the presence of the testator, where all the witnesses were dead; it was clearly held, that such question was proper for the decision of a jury, who might found their verdict upon mere circumstances and probabilities. In the courts of common law, where a will of lands is produced, it is usual to call but one witness to prove it; but that is said only to be the case where no objection is made on the part of the heir, who is entitled to have all the witnesses examined, yet in such case the heir himself must produce the other witnesses, for the devisee need produce only one, if that one can prove all that is requisite to

Of the evidence of the attestation.

That in the courts of common law one of the subscribing witnesses may prove the attestation by the others.

arbitrium, et finire testamentum; sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficiet uno [tempore] eodemque die, nullo actu [extraneo] interveniente, testes omnes, videlicet simul, nec diversis [temporibus] scribere, signareque testamentum. Finem autem testamenti subscriptiones, et signacula testium esse decernimus. This exactness with respect to the simultaneous performance of the act of publication was retained out of the civil law, or *jus civile*, when the civil and prætorian law were reduced into agreement, as I have before shown: for the form and validity of a will, as ultimately established, was a tripartite constitution. The necessity of witnesses, and their presence at one and the same time, was founded on the *jus civile*—the subscriptions by the testator and the witnesses on the imperial constitutions—the sealing and the number of the witnesses, was settled by the edict of the Prætor.

And if *all* the witnesses deny their hands, still the devisee may go into circumstances to prove the due execution of the will.

establish the validity of the will.(c) So that if the two other witnesses be called by the heir, and even refuse to verify their attestation, still the proof of their hand-writing will be enough, if one of the three can prove the other circumstances of the execution. And, indeed, it has been held, that if they *all* swear that the will was *not* duly executed, the devisee may yet go into circumstances to prove the due execution. This was so ruled, as it appears(f) in Lord Chief Justice Pratt's time, in a case of *Pike v. Badmering*, on a trial at bar, where the three subscribing witnesses to a will were called and denied their hands. The court permitted the plaintiff to contradict that evidence, and he supported the will against such testimony.

* [440]
Whether the evidence of the subscribing witnesses can be received against their own attestation.

* It appears, that with the greatest reason the evidence of subscribing witnesses against their own attestation has always been received, if received, with the utmost reluctance; and the courts have, on the other hand, shown an alacrity in admitting counter-testimony to establish the will against such suspicious and discordant depositions. In *Lowe v. Jolliffe*,(g) which was tried at bar, upon an issue of *deviseavit vel non* out of Chancery, the three subscribing witnesses to the testator's will, and the two surviving witnesses to the codicil, and a dozen servants of the testator, all swore him to be utterly incapable of making a will, or of transacting any other business, at the time of making his supposed will and codicil, or at any intermediate time. But this evidence was encountered by the depositions of several of the nobility and principal gentry of the county where the testator resided, who had frequently and familiarly conversed with him, during the whole period, and some on the very day on which the will was made; and also of two eminent physicians who attended him, and who all swore to his entire sanity and more than ordinary intellectual vigour.

The counsel for the plaintiff also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will; and read the deposition of the attorney, by whom the codicil was drawn and witnessed, (he being dead, and his testimony perpetuated in chancery) who spoke very circumstantially to the very sound understanding of the testator, and his prudent

(c) *Gilb. Eject. Sect. 8. Holt Rep. 742. Dayrell v. Glascock*
(f) *Strange 1096. (g) 1 Blackst. 365, 416.*

and cautious conduct, in dictating the contents of his codicil. Upon the whole, it appeared to be a very black conspiracy, to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded, that "all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to have committed them in court, but they had withdrawn themselves. However, a prosecution of some of them for perjury was strongly recommended by the court. And the three testamentary witnesses were afterwards convicted, and sentenced each of them to be imprisoned for six months, to stand twice in the pillory, with a paper on their heads, denoting their crime, once at Westminster Hall Gate, and once at Charing Cross, and to be transported for seven years.

*[441]

We observed that, however the testimony of these subscribing witnesses against their own attestation was *ultimately discredited*, no doubt was entertained of their competency; as was remarked by the late Lord Chief Justice Kenyon, in commenting upon this case, in *Bent v. Baker*, (161) who entirely approved of Mr. Justice Buller's distinction in this respect between *negotiable* and *other* instruments. So that the observation of Mr. Justice Yates, in the case of *Alexander v. Clayton*, (h) viz. that "the witnesses ought not to have been admitted to give evidence against their own attestation," seems to have been too strong for the present doctrine, or perhaps incorrectly stated by the reporter.

It is one thing to offer testimony to destroy the validity of an instrument attested by one's own signature and subscription, and another to deny the *fact* of one's own attestation. Lowe

(h) Burr. 2224.

(161) 3 T. R. 34; and see the reasons for this distinction in Mr. J. Buller's opinion, pronounced by him in the same case.

v. Jolliffe, as above cited, is an example of the admissibility of the former species of testimony as well as of its defeat. It is plain upon principles that a man must be *admitted to deny what appears to be his own attestation; for to exclude him on a ground of inconsistency and contradiction, is to take for granted against him what is itself a primary object of proof. But it is equally clear, that his denial may be discredited and overthrown by the counter-testimony of the other witnesses, and that the will may be established against such a denial. Thus in the case of *Alexander v. Clayton*, mentioned above, Mr. Justice Yates observed, that there were many cases where one of the witnesses had supported a will, by swearing that the other two had attested, though they both denied it. And upon the same occasion it was said by Lord Mansfield, that "he had known several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witness, against that of the attesting witnesses who had denied their own attestation. It would be, added his Lordship, of terrible consequence, if witnesses to wills were to be tampered with to deny their own attestation."

Of the doctrine laid down generally by Lord Mansfield, in *Walton v. Shelly*.

Thus, therefore, the law appears to be well settled and discriminated upon these important points of evidence; and it is to be observed, that the present consideration is confined to the case of subscribing witnesses, and that therefore there is nothing in what has been stated, or produced, which contradicts the maxim of law, as it was recognised or decided upon in *Walton and others v. Shelly*,⁽ⁱ⁾ that *no man shall be suffered to give evidence to invalidate his own instrument*; nor does it seem that Lord Mansfield, in pronouncing his judgment in that case, laid down the rule with greater latitude than accords with the settled distinction, as to the testimony of subscribing witnesses, above adverted to. "What strikes me," said his Lordship, is the rule of law, founded upon public policy, which I take to be this—that no PARTY who has signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument which he has so *signed." Now it is plain, that a subscribing witness to a deed or will, is in neither case, by force of such subscription, a PARTY to the instrument.

(i) 1 T. R. 296.

It is true, indeed, that the admission of a subscribing witness to a will to invalidate *that* instrument, forms a stronger case than where such witness comes to destroy the validity of a *deed* which he has attested, since, in the latter instance, he attested only the execution, and not the intrinsic or general validity of the instrument, but in the former, the testamentary capacity of the testator, as well as his formal execution, is verified by the subscription of the witness, not to mention also that such subscription is essential to the constitution and perfection of the instrument itself, so that in giving testimony against the validity of the will which he has attested, he comes to overthrow that which he himself was *actively* and *instrumentally* concerned in establishing. It seems probable, therefore, that the consideration of these peculiarities, characterising the nature of the attestation of wills, suggested to Lord Kenyon a foundation for the resemblance, which, in the case of *Adams v. Lingard*,^(k) his Lordship appeared to think there existed between the case of an indorsor of a bill and a subscribing witness to a will, as to the admissibility of their evidence to overthrow the instrument to which they had given credit by their signature. In this case, which was that of an indorsor of a bill, the late Chief Justice said, that he wished the point to be settled in the House of Lords, being then of opinion, that the indorsor was a witness proper to be heard, and other judges being of a contrary opinion. He then mentioned a case which was before Sir Joseph Jekyll, many years before, and another, which had been decided since, meaning that of *Lowe v. Jolliffe*, above stated, wherein his Lordship said, it had been determined at a trial at bar, that three subscribing witnesses to an instrument might be permitted to deny the validity of it. But when the question came before the court on a motion for a new trial (his Lordship still adhering to his former *opinion*) it was said by Buller, J. that "the case before them was very different from that of witnesses to a will. The indorsor had passed that *negotiable instrument* to the plaintiff as a good and valid security, and it would be attended with consequences most injurious to society, if these securities might be cut down by the persons passing them; it was only for two men to conspire together to cheat

A distinction between the attestation of wills and deeds, in respect to the point under consideration.

And of negotiable instruments and other instruments.

* [444]

(k) Peake, Ni. Pr. Ca. 117.

all the world." It is remarkable, that in the much considered case of *Bent v. Baker*, which was determined three years before that of *Adams v. Lingard*, Lord Kenyon expressed his entire acquiescence in the distinction as to this point, between negotiable instruments, and deeds and wills.

Of the proof to establish a will of lands in courts of equity.

The reader has been shown above, that the testimony of one of the three witnesses is enough to prove a will of lands, in a court of common law. He will find the same rule of evidence laid down in early cases, with respect to the mode of establishing a will in the courts of equity. Thus in the case of *Longford v. Eyre*,^(l) Lord Macclesfield makes the following observation: "The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his own subscribing it in the presence of the testator, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator; and then *one witness proves the full execution of the will*, since he proves that the testator executed it, and likewise, that the three witnesses subscribed it in his presence. But in the case of *Townsend v. Ives*,^(m) which came on about twenty-five years afterwards in the Court of Chancery, where the bill was preferred by the legatees, whose legacies were charged on the real estate, to have the will established, the rule was peremptorily laid down, that ALL the witnesses, if living, must be examined, to prove a will of lands. Thus, also, Lord Camden, in the above cited case of *Hindon v. Kersey*, in speaking first of the method of proof in a court of common law, says, "one *witness is sufficient to prove what all the three have attested; and though that witness must be a *subscriber*, yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must always be produced, *because he is the best evidence*. This we see in common experience; for, after the *first* witness has been examined, the will is always read." But the same judge speaking afterwards of the course of the Court of Chancery in this respect, expresses himself thus: "Sanity is the great fact which the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce*

The settled rule now is, that all the witnesses, if living, must be examined.

* [445]

(l) 1 P. Wms. 741. (m) 1 Wils. 1748.

in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court, never to establish a will, unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of those, whom the statute has placed about his ancestor."

But if one of the witnesses be dead, a will may be read, on proof of his hand-writing, though this must be accompanied by positive and satisfactory proof, that he *is* dead. Thus in *Bishop v. Burton*,⁽ⁿ⁾ the plaintiff being put to prove the will, the proof was of the hands of the devisor, and of two of the subscribing witnesses, who were proved to be dead; and as to J. B. the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believed it to be true, that he died two years before, and believed his name subscribed was his proper hand-writing. But the Court was of opinion, that *that* was not sufficient proof to have the will read in evidence.

If one of the witnesses be dead, proof of his hand-writing may be read.

In *Grayson v. Atkinson*,^(o) an objection was made for the defendant, that one of the witnesses being beyond sea, and the others not having sworn that the testator acknowledged his hand-writing to the third, who was abroad, and there being no proof about him, the will could not be established: on the other side it was contended, that the same credit was to be given to his hand-writing *as if dead*. But the Lord Chancellor Hardwicke doubted thereof, and said, "he did not know that it had been determined, that the same credit was to be given to the hand-writing of a witness beyond sea, as if dead, because it was not necessary to presume the impossibility of getting at him, and he was apprehensive fraud might be used. It not being proved that the testator published his will in the presence of the other witness, but only of those examined, and that the other witness subscribed in their presence, it stood on the proof of the attestation. If the witness was dead, it might possibly be sufficient. That was the act of God, and therefore the court gave credit to his hand-writing. But in this case you may have a commission to examine the witness beyond sea."

Whether the hand writing may be proved of a witness beyond sea.

* [446]

(n) Comyns' Rep. *Bishop v. Burton*, in Searl. (o) 1 Vez. 459.

In the case of *Lord Carrington v. Payne*,^(h) however, a question was made, whether one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His hand-writing was proved; and the other two witnesses were examined. Lord Alvanley, then the Master of the Rolls, held, that it was not necessary to have his examination; but that *it was the same as if he was dead*. But his Honour seemed to found this resolution on the submission of the heir, who, he observed, did not make a point of it. He mentioned a case, however, of *Mr. Fitzherbert*, where one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad. And where, in another case, before Lord Chancellor Thurlow, it was urged that one of the witnesses to the will was abroad, his Lordship said,^(q) he doubted whether the rule had ever been laid down so largely as, that the will *could not* be proved, without examining *all* the witnesses, although the *practice* has been to examine all.

¶ [447]

The hand-writing of a witness who since the subscription has become insane, may be proved.

*This rule has been relaxed in other instances, where, to have rigidly adhered to it, would have imposed impossibilities upon persons coming into equity to establish these instruments. As, where a witness to a will of real estate had since become insane, proof of the hand-writing of such witness was allowed.^(r) And in a very late case at the Rolls, proof even of the hand-writing was dispensed with, in the case of an old will, which appeared by the date to have been made 30 years before, the testator having been dead above 20 years, and no account being to be obtained of one of the subscribing witnesses. The hand-writing of two of the witnesses was proved. And his Honour observed, that he did not see how a will could be distinguished from a deed as to this point; only that the former, not having effect till the death, wanted a kind of authentication which the other had. That was from the nature of the subject. But he thought the proof sufficient in that case; for in a late case⁽¹⁶²⁾ in the court of King's Bench, an inquiry of just the same kind was held sufficient, which excluded the question. In that case they had made all inquiry, and could hear nothing of the witness.

And in the case of an old will, where no account can be given of a witness, proof of the hand-writing may be dispensed with.

(p) 5 Vez. jun. 411. (q) 2 Bro. C. C. 504. (r) *Bennet v. Taylor*, 9 Vez. jun. 381.

(162) *Cunliff v. Sefton*, 2 East. 183, where, in an action upon a bond, evidence was offered that diligent inquiry had been made after one of

*PART VII.

WITH respect to personal estate, except the will be made and proved according to the forms required by the 19th, 20th, and 21st sections of the statute, to validate the nuncupative testament, or where it is the case of soldiers in actual military service, (who, by virtue of the 23d section of the said statute, may still make nuncupative wills without the necessity of observing the forms to which nuncupative testaments are subjected by the preceding clauses) all testamentary dispositions thereof must, since the statute of frauds, be in writing. The Ecclesiastical Courts, to whose jurisdiction the establishment of personal testaments appertain, require no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. Swinburn seems to have considered it necessary, indeed, that a testament of chattels should be published in the presence of two sufficient witnesses;(s) and Bracton(t) appears to have held the same opinion; or rather, according to Sir William Blackstone, to have copied implicitly the rule of the civil law. For it is not to be doubted, but, that a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication*, is effectual, provided the hand-writing can be sufficiently proved.(u) And though it be written by another person, by the testator's direction, without even having been signed by the testator, if it can be shown to have been made according to such instructions, and to have received the approbation of the testator, it will be effectual to pass the personal estate.(x)

Of the requisites to the validity of a personal testament.

(s) Vid. Swinb. on Wills, pt. 1. sect. 3.

(t) Lib. 2. c. 26.

(u) Godolp. O. L. p. 1. c. 21.
Comyns, 452. Gilb. Rep. 260.

(x) Limbery v. Mason and Hide,

the subscribing witnesses, at the places of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or of any circumstance relating to him, it was held sufficient to let in proof of the *hand-writing of the other subscribing witness*, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

† [449] The proof of the will may be in two forms, of which one is called the vulgar or common, the other is termed the *solemn form or form of law. If the will be not contested, the executor or administrator *durante minore etate*, or *durante absentia*, or *cum testamento annexo*, may prove it by his own oath, or, as it is said, in some dioceses in York, with the additional oath of *one* witness, before the ordinary or his surrogate. But if the validity of the will be disputed, it then becomes necessary to prove and establish the will in the solemn way, or as Swinburn expresses it, in form of law; that is, *per testes*, in the presence of such persons as would be interested if the deceased had died *intestate*. Two witnesses must then be sworn and examined upon interrogatories administered by the adverse party. Between which two forms of proving a will, there is a substantial difference of effect; for after an informal proof the executor may be compelled again to prove the will in due form of law, which may be inconvenient if the witnesses are dead in the mean time. The executor, may, therefore, if he please, for greater safety, if he himself have an interest in the will, elect to have the will proved in the more solemn form, (y) and in such case he must cite the persons who would be interested under an intestacy, to be present at the probation thereof. If the will is only proved in the *common form*, it may, at any time within 30 years be disputed, (z) but if the solemn form be pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy. (a)

When a will is proved by the probation of the more formal or solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses, is followed in our Ecclesiastical Courts. And such witnesses must be able, at least, to depose, that the testator declared the writing produced to be his last will and testament, unless where the will or codicil was written by the testator himself, in which case, as has been above observed, the validity thereof may be established upon proof of the hand-writing *only, but it ought to be by the evidence of such as have seen him write; (b) and though this evidence ought, in general, to be given by two witnesses, yet, if

• [450] Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts.

(y) Burn. Eccl. L. 208. (z) Godolph. O. L. 62. vol. 1. (a) 4 Burn. Eccl. L. 207. (b) See the case of Eagleton v. Kingston, 8 Ves. jun. 438.

there be one subscribing witness, who appears to attest the fact of the identity of the will, the testimony of a single witness is said to be sufficient. And where the will has been wholly written by the testator, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the spiritual court. The general necessity for the evidence of two witnesses is borrowed from the Roman law; the maxim of which is, that one witness alone cannot be heard, or, in other words, is no witness at all. (c) "*Unius responsio testis omnino non audiat.*" (163)

We have seen, that notwithstanding the rule of the Roman law, that *nemo testis esse debet in propria causa*, legataries were permitted to give evidence in support of a will, upon the distinction between particular and universal successors; but by the practice of the Ecclesiastical Courts of this kingdom, no legatee can be received to give his testimony to establish a will of personal estate, until his interest has been removed by his receipt of the value of his legacy, or he has renounced it and discharged the executor.

But as to the *form* of the instrument itself, the Ecclesiastical Courts are not scrupulous. A memorandum or scrap *of paper, written (d) by a person in contemplation of death, and with a design to make it operative after that event, may be proved in that court as testamentary, and, if so received, it seems a court of equity will support it. (e) A string of examples might be cited to illustrate this observation; many were produced in the case of *Limbery and Mason v. Hyde*, in *Comyns' Reports*; (f) among which, that of *Loveday v. Claridge* is strong to the purpose. The testator intending to make his will, pulled a paper

Of the form of the testament.

* [451]

Determinations of the Ecclesiastical Courts on this subject.

(c) See the case of *Thwaites v. Smith*, 1 P. Wms. 13. (d) *Vid. Coxe v. Basset*, 3 Vez. jun. 158. (e) *Comyns*, 452. (f) *Vid. Downing v. Townsend*, *Ambler* 280, 592.

(163) Cod. 4, 20, 9. Where the Ecclesiastical Court proceeds in a matter merely spiritual, or confined to their own jurisdiction, no prohibition lies, if their proceedings are contrary to common law; as if they refuse the testimony of one witness. But if they disallow the proof of a temporal matter, by one witness, though such temporal matter be incident to a matter within their jurisdiction, a prohibition lies from the temporal courts. 1 Show. 158, 172. *Shatter v. Friend*; and see H. H. C. L. 5th edit. and the note (q) by the Editor.

out of his pocket, and wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish, (for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay a dividend of stock) yet it was held to be a will. Thus too, in a case where a woman possessed of considerable real and personal property, wrote a letter to an attorney, her friend, giving him an account how she would dispose of the same, and in her ignorant way, added, "*please not to put this rigmaroll in till I find it correct—this only by way of memorandum in case I should go off suddenly.*" And the testatrix survived the writing of that letter three or four months, but took no further steps therein, Sir George Hay was of opinion, that, under the circumstances, such letter could not operate as the will of the deceased; but on an appeal, the Court of Delegates reversed his sentence.

In *Cobbold v. Bowes*, a gentleman gave instructions to his attorney to prepare his will for the disposition of his real and personal estate. The will was accordingly prepared, settled by the testator, and engrossed for execution with the usual clauses of attestation. This will was of considerable length, and at the left-hand-corner of each sheet of paper was the word '*witnesses.*' Upon the death of the deceased, the will was found with his name subscribed to each sheet, and, opposite *to the seal, on the last sheet, but not witnessed. Dr. Calvert, the then judge of the Prerogative Court, was of opinion, that the deceased, *by permitting the clause of attestation to remain*, had bound himself down to a formal execution, and, therefore, pronounced against the will; but on appeal, the Court of Delegates reversed such sentence, and thereby rendered the will valid as to personal property. (164)

Similar in effect to the case just stated, was that of *Wright v. Walthoe*, cited in *Limbery v. Mason*,^(g) where there were three testamentary schedules, whereof one was without date; to the second, the words '*in witness*' were subjoined; and the third concluded abruptly; yet, being written by the testator, they were

(g) *Comyns*, 452.

(164) See these cases more at large in a note by the Reporter to the case of *Matthews v. Warner*, 4 *Vez. jun.* 200.

declared to be his will. In the same manner, and about the same time, viz. in the year 1711, in a case of *Worlick v. Pollet*, before the Delegates, where the testatrix had sent for a person to make her will, and given him instructions for the same, and the will was accordingly drawn, read to, and approved by her, and declared by her to be her last will, and three witnesses were sent for to see her execute, the words signed and sealed being already written, but she died before any other execution, it was held a good will before the Delegates, who affirmed the first sentence which had been reversed upon an appeal.

And again, in a cause of *Brown v. Heath*, determined in 1731, where a will of real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet, it was held a good will of the personal estate, and though more was intended to be done, yet it was adjudged that it should be good for what was done.

*But the later determinations at Doctors Commons, seem tending to establish a more discriminative doctrine. It now appears to be agreed, that if a testator leaves an instrument, which, upon the face of it carries evidence of an intention in the framer to perfect it by some further solemnity, which he has died without having superadded, having had afterwards sufficient time, and health, and recollection to complete it, such paper may be inferred not to have been intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased. Thus, in a late case, where a person had written a paper, purporting to be a disposition of his property, to which a clause of attestation was added, but not filled up, sentence, as I am informed, was pronounced for an intestacy upon an inference, from this omission, of change of intention. And, where another person had sealed the paper propounded for a will, without signing it, a similar determination was given upon a similar ground. * [453]

To the same effect was the decision in the case of *Griffin v. Griffin*, (165) determined at the Commons a very few years ago. Richard Griffin executed a testamentary paper, dated 27th September, 1777. On the 18th of January, 1789, he began a paper,

(165) Cited in *Matthews v. Warner*, 4 Vez. jun. 197, note (a) *et vid. ex parte Fearon*, 5 Vez. jun. 644.

and having written no more than the commencement of what he meant to do, being called away to dinner, he locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of the peace. The questions were, whether this unfinished paper was a revocation of the former paper executed in 1777 ; or, whether it was to be established substantively, and conjunctively with the former paper. It was determined, that the unfinished paper could have no effect ; the testator having lived eight days after making it, in health and capable of business ; and not having concluded it, the presumption of law, even if there had been no other paper, would have been, *that he never meant to finish it ; or that it was intended only as a draft for consideration ; and the case was still stronger as there was an executed paper.

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Of the principle on which the Courts act in receiving or rejecting informal papers as testamentary.

The same doctrine is recognised by Lord Eldon, in the late case of *Coles v. Trecothick*,^(h) who thus expresses himself on the point : “ The observation is just, that as to personal estate, if it appear upon the will, that something more was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will.” It seems, therefore, to be now understood, that not *every* scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the Ecclesiastical Court as testamentary ; but it must appear, and that from the paper itself, and not from extrinsic evidence, that the writer intended the paper to operate as it stood when it was written, without contemplating any *farther act* to be done to give to it its perfection and full authenticity ; and this intention, every such paper, if it contains dispositions of personal property prospectively to the decease of the party, will be held to import, unless by its mode of expression, or manner of execution, it discloses a suspended intention in the party framing it.

It seems hardly necessary to say, (the proposition being implied in what has gone before) that the paper must appear to be written with the actual design of disposing after death of the property in question. There must be the *animus testandi*, which is rendered in the Touchstone,⁽ⁱ⁾ by the expressions of “ a mind to dispose—a firm resolution and advised determination to make a

(h) 9 Vez. jun. 249.

(i) 404.

testament; for it is," says that book, "the *mind*, not the *words*, which doth give life to the testament. Therefore," continues the same author, "if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, write to say, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded."

*Nuncupative revocations of personal wills, deliberately made and solemnly executed, were likewise an object of special prohibition by the legislature in this comprehensive statute, which, in the 22d section has enacted, that "no will in writing, concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed, by any words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at least." A remarkable case^(k) which happened in Lord Nottingham's time, has been said to have given rise to this clause. Mr. Cole, at an advanced age, married a young woman, who, during his life, did not conduct herself with propriety. After his death, she set up a nuncupative will, said to be made *in extremis*, by which the whole estate was given to her, in opposition to a written will made three years before the testator's death, giving 3000*l.* to charitable uses. The nuncupation was proved by nine witnesses. Upon the appeal to the Delegates, from the sentence of the Prerogative Court in favour of the written will, Mrs. Cole offered to go to a trial at law in a feigned action, submitting to be bound by the result. Upon the trial at the bar of the court of King's Bench, it appeared, that most of the witnesses for the nuncupation were perjured; and that Mrs. Cole was guilty of subornation. After that, she applied for a commission of review; which was refused. And, upon that occasion, Lord Nottingham said, "I hope to see, one day, a law, that *no written will shall be revoked but by writing*."

Such has since been the fate of revocations in respect to testamentary dispositions of personal property. Positive dispositions by nuncupative testaments are not laid by the statute under the same absolute prohibition, but, as Sir William Blackstone observes,^(l) the le-

*[455]
Of nuncupative wills and revocations.

(k) Vide *Matthews v. Warner*, 4 Vez. jun. 196, note (a). (l) Comm. 2 vol. 500.

gislature has provided *against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and it is hardly ever heard of but in the only instance where favour ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, and, as the same learned writer observes, not in any loose, idle discourse; for he must require the by-standers to bear witness of such his intention. The will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprise. To which we may add, that no such will is available, where the estate thereby attempted to be bequeathed exceeds the value of 30*l*. By perusing the clause at the head of the chapter, or in the statute at the end of the volume, standing first in the Appendix, the reader will at once be possessed of all that relates to this subject; and, by referring to the 2 Ann. c. 16. he will find it thereby enacted, that "all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto."

Of the qualification of witnesses to establish a nuncupative testament.

And of the degree of evidence.

It is to be remarked, that the words in this clause are, that "no nuncupative will shall be good that is not *proved by the oaths of three witnesses at the last*, that were present at the making thereof; whereby the construction is excluded, which, we have seen, has allowed the publication of a written will of lands to be established by the proof of any one of the three subscribing witnesses. Dr. Shallmer,^(m) by will in writing *gave 200*l*. to the parish of St. Clement Danes; and afterwards, Prew, the reader, coming to pray with him, his wife put him in mind to give 200*l*. more towards the charges of building their church; at which, though Dr. Shallmer was at first disturbed, yet afterwards he said he would give it, and bid Prew take notice of it; and the next

† [457]

(m) Phillips v. the Parish of St. Clement Danes, 1 Eq. Ca. Abr. 404.

day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the Doctor's widow put down a memorandum in writing of the said last devise, and so did her maid; Prew died about a month afterwards, and amongst his papers was found a memorandum of his own writing, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.* and purporting that he had put it in writing the same day it was spoken; but that writing which was mentioned to be made the same day it was spoken, did not appear; and these memorandums did not expressly agree. About a year afterwards, on application of the parish to the Commissioners of Charitable Uses, and producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.* and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses; for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires, not only three to be present, but that the *proof* shall be by the *oath* of three witnesses.

And by force of the 21st section; until probate has been obtained of a nuncupative will, it cannot be set up in pleading against the administrator, as appears by the case of *Verhorn v. Brewen*(*n*) where an administrator brought a bill to discover and have an account of the intestate's estate; and the defendant pleaded, that the supposed intestate made a *nuncupative will*, and another person executor; to whom he **was* accountable, and not to the plaintiff as administrator. But it was decreed, that though there were such a nuncupative will, yet it was not pleadable against an administrator before it was proved.

* [458]

It is clear from what has been already shown, that no nuncupative disposition, though made and published with the due formalities prescribed by the 19th and 20th sections, can make any alteration in a written will, by reason of the restriction in this particular contained in the 22d clause of the statute. Yet if a legacy given by a written will has lapsed, or was void for some legal objection, such legacy might be the subject of a nuncupative dis-

Of altering a written will by a nuncupative disposition.

position. Thus, where one G. S.† on the 2d of September, 1679, made his will in writing, and appointed E. his wife, his executrix, and gave all the residuum of his estate, after some legacies paid, to her, and the wife died in the testator's life-time, who, afterwards, made a nuncupative codicil, and gave to another all that he had given to his wife, and died; and the single question was, whether this nuncupative codicil was allowable, notwithstanding the 22d section of the statute of frauds; it was resolved by Sir Hugh Wyndham, Justice, Sir Thomas Raymond, and several civilians joined in the commission, that the nuncupative codicil was good, for, by the death of the wife before the testator, the devise of the residue was totally void, and so there was no will as to that part. The nuncupative codicil was, therefore, a new will, as to so much, because there was no will, its operation being determined. And it was objected, that, by the same reason, if any part of a will in writing was made by force or fraud, the thing so given and specified in that part, may be devised by a nuncupative codicil, and so the will might be altered contrary to the words of the statute; but it was answered by the court, that if such part of a will were so obtained, it was no part of the will, and so such codicil would be no alteration of what was not, but would be an original will for *so much. And they further said, that if A be possessed of an estate of 1000*l.* and by will in writing gives a part of it, as 500*l.* to B, he might give the residue by a nuncupative will, so as he did not change the executor.

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It has been held, that a disposition, not valid as a nuncupative will, for want of the observance of the formalities required by the statute, may be supported as a trust in equity. The case cited in support of which proposition, is that of *Nab v. Nab*(o) where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and gave several legacies, and made her mother executrix, but took no notice of the 180*l.* but afterwards, by word of mouth, desired her mother, if she thought fit, to give the 180*l.* to her niece; and on a bill filed by the niece for this sum, it was proved in the cause, for the plaintiff, that the daughter, after making the will, had said, she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter ap-

† Sir Thomas Raymond, 334, before the Delegates at Sergeant's Inn, December 9, 1679.

(o) 10 Mod. 403. Gilb. Eq. Rep. 146.

peared only by the answer of the mother upon oath. It was agreed, that this was not good as a nuncupative will, being above 30*l*, and not reduced into writing within six days after the speaking, as the statute of frauds requires. But the mother was decreed to be a trustee for the niece. I find no other case that comes up to this doctrine, and, perhaps, the courts will not, hereafter, if the point should arise, be disposed to be guided by a single precedent, so little in unison with that feeling of regret which they uniformly express in being forced into a departure from the plain and wholesome provisions of the statute, by the stream of overbearing authorities.

By the 23d section of this statute, soldiers in actual military service, and mariners and seamen at sea, are excepted out of the clauses restraining the testamentary power, in respect to personal estate. Soldiers may still, therefore, make nuncupative wills, or revocations of personal estate, and dispose of their goods, wages, and other chattels, without the *forms required by the law in other cases. And by statute 5th William 3, c. 21, sect. 6, the probate of any common soldier, was and continues to be exempted from the duties imposed by that act. With respect to seamen, however, the power of making nuncupative wills left to them by the statute of frauds in the unfettered state in which it stood previous to that statute, has been laid under restrictive provisions by subsequent statutes, for their better security and protection against fraud and imposition. The regulations which regard this object will be found in the Appendix to this book in the abstracts of the statutes, 26 Geo. 3, cap. 63, and 32 Geo. 3, cap. 34; subjoined to this volume, for the convenience of reference.

Of soldiers' and seamen's wills.

* [460]

PART VIII.

BEFORE the statute of 29 Car. 2, wills in writing of real estates might be revoked by parol; and, indeed, after that statute, such power would still have existed, (as we may conclude in analogy to the doctrine of holding written agreements revocable by parol notwithstanding the 4th section) if by the 6th and 22d sections, special provisions had not been made to prevent it. Thus it is held in regard to the 12 Car. 2, c. 24, giving power to

Of the 6th section respecting revocations of wills of lands.

the father to appoint a guardian of his child, that the appointment under that statute may still be revoked by a will, without any attestation; because no express provision was made against it by that statute. (h)

* [461] Much has been said on the difference in the penning of the 5th section of the statute respecting the execution of a will of lands, and of the succeeding section, which prescribes and restricts the methods of revocation. At the end of the case of *Right v. Price*, (q) in *Douglass's Reports*, the learned Reporter *has added a note, in which he has animadverted upon the difference in the language in the two clauses, which he attributes to inaccuracy in the composition of the act; and it cannot be denied, that the variation in the terms, where the same principle must have governed, seems hardly explainable, but by imputing a mistake to the legislature. By the 5th section we have observed, that the testator is not required to *sign in the presence of the subscribing witnesses*, but the subscribing witnesses are called upon to attest *in the presence of the testator*. Mr. Douglass observes in the note alluded to, that he believes it is universally understood, that, to satisfy this 5th section, a testator must sign in the presence of the witnesses. But by what has been above produced to the reader on this subject, it must have sufficiently appeared to him, that such actual signature, in the presence of the witnesses, is not held to be requisite, and that it is enough, if the testator acknowledges his hand-writing to the signature, or, holding the will in his hand, publishes and declares it to be his will, when the witnesses subscribe their attestations.

By the clause respecting revocations, the subscription of the witnesses is not expressly directed, while, on the other hand, the signing of the testator in the presence of the witnesses, is positively prescribed. The clause runs as follows: "And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time, after the said four and twentieth day of June, be revocable, otherwise than by some other will, or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and

(p) Doug. 244. (q) Ex parte the Earl of Ilchester, 7 Vez. jun. 348.

tenements, shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will, or codicil, in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

* [462]

"It may be reasonably inferred to have been the intention of the legislature, to impose the same obligation as to the formalities of execution on the instruments by which solemn testamentary dispositions were to be revoked, as on those by which they were to be set up. The construction which has been put upon the language of the revocation clause, has brought the two sections into equality, and thus imparted consistency and simplicity to the scheme of the statutory restrictions upon the execution of wills. In conformity to this plan of construction, as it had been judged a sufficient compliance with the requisitions of the *fifth clause*, if the testator *acknowledged* his signing, without *actually executing it in the presence of the witnesses*, it became important so to read the *sixth section*, which requires *signing in the presence of the witnesses*, as to bring it into harmony with the preceding section. The courts, therefore, have read the concluding words of the sixth section, *will, or codicil, or any other writing, signed in the presence of three witnesses*, so as to detach the words "will or codicil" from the succeeding words, "or any other writing," coupling these last words with the words which immediately follow, viz. "signed in the presence of three witnesses."

Of the grammatical reading of the language of this section, where by it is brought into agreement with the provisions of the preceding clause.

Thus they have applied the requisition of a "signing in the presence of three witnesses," to the *proximum antecedens* only, "or any other writing," and again coupling the succeeding words "declaring the same" with the words immediately before it, have made therewith this complete sentence, "*or any other writing of the deviser, signed in the presence of three or four witnesses, declaring the same.*" At the same time the words "will or codicil" were understood to import a will or codicil executed and perfected according to the requisitions of the foregoing section. (r) Interpreting the language of the 6th clause, upon these

Of the legal distinctions founded upon this construction.

(r) *Ellis v. Smith*, 1 Vez. jun. 11, *Hoyle v. Clarke*, 218.

* [463]

principles of construction, the law which arises upon it is this ; that a will or codicil, in order to revoke a former will, must be executed *with the same solemnities as the original will ; that is, it should be signed by the testator, or by his directions, and subscribed by three witnesses, in his presence. And if a subsequent writing accompanied with all the formalities requisite to a perfect will of lands, under the 5th clause, makes a fresh disposition of the property, inconsistent with the dispositions thereof by a former will, it is a plain revocation without any express declaration of intention to revoke : but if a writing, not purporting to be a will, nor duly attested as such according to the 5th section, contain dispositions inconsistent with those of a subsisting will, it is necessary that it should contain an express declaration of intention to revoke, and furthermore, be actually signed in the presence of three or more witnesses, but which witnesses need not, as in the case of an original will, under the 5th section, subscribe their names to the instrument, in the presence of the testator.

a.

*[464]

Where a will devising real estate is first made and executed with the due solemnities, according to the statute, and then another will is made, containing dispositions of the same lands, but not executed according to the requisites prescribed by the 5th section of the statute, though such second will contain a general revoking clause, it will not operate to revoke the first will. In the well known case of *Onions v. Tyrer*,^(*) where one by will duly executed, and attested by three witnesses, who subscribed the same in the presence of the testator, devised lands to trustees, to several uses under which the plaintiff claimed ; and afterwards made another will of the same lands, devising them to *other* trustees, but to the *same uses*, and there was a clause in this last will, revoking all former wills, but the same, though subscribed by the testator, and attested by three witnesses, was not subscribed by these witnesses in the presence of the testator, the former will was held by Lord Chancellor Cowper not to be revoked by the second instrument. The ground his Lordship went *upon was this, that the disposition of the same lands in the second will to the same purposes as in the first will, showed that the testator did not mean to revoke his first will, as

(*) 1 P. Wms. 343.

to the devise of these lands, unless he might, by the second will, at the same time that he revoked the former, set up the like devise to take effect by virtue of his second will; and his second will not having been perfected, so as to make the devise of the lands therein to be good, the same devise by the former will stood unrevoked. And though the former will was also *cancelled*, his Lordship held, that it was plain that the testator did not mean to revoke the former will by *cancelling*, unless he could substitute another perfect will in lieu thereof. And therefore, the cancelling thereof, was but a circumstance, showing that he thought he had made a good disposition by the second will; and it was done in confidence thereof, and with no other intent but that the second will should thereby most certainly take place.

But as the second instrument, in this last cited case, was plainly intended to be a *substantive will*, and not *merely a revocation*, it should seem that, according to the principles of construction adopted by Lord Hardwicke, in the case of *Ellis v. Smith*, there was a *sufficient ground* for holding it to be no revocation, without resorting to the reasoning from intention, on which Lord Cowper seemed to found his decree; for to revoke by virtue of its specific operation as a will, independently of any intention, it ought to have been validated as a will according to the particular directions of the 5th clause. In this way of understanding the doctrine, I apprehend, that if the second will in *Onions v. Tyrer* had contained only dispositions of personal estate, with a clause of general revocation, as to all former wills, yet not having been executed as a will to pass lands, it could not have operated as a revocation of the former will, although, if the case had been thus circumstanced, there would have been no foundation afforded by it for any reasoning from intention. Neither could the second instrument, if the case had been as I have now supposed, have operated as a *declaration in writing*, * [465] within the concluding words of the 6th section, being evidently intended as a *will*. But if the second instrument had contained no disposition whatsoever, but had purported only to have been framed to revoke the former will, then, it is humbly conceived, it might, according to the principles laid down for construing this clause of the statute, by Lord Hardwicke and other great judges, operate as a declaration in writing, to the

effect of revoking the former will, if signed in the presence of three witnesses, according to the concluding clause of the last-mentioned section.

Thus, in the case of *Limbery v. Mason*,^(t) it was agreed, that there was no doubt but that a testator, by any writing, *directly designed for that purpose*, and executed as the statute of 29 Car. 2, sect. 6, directs, or by any cancelling, obliteration, &c. designed merely to disannul the former will, might have revoked it, without more; but if he designs to do it by a new will, *unless such writing be effectual to operate as a will*, it shall not amount to a revocation. And this it was said was agreeable to the rules of the civil law.⁽¹⁶⁶⁾ It is not necessary, however, that the revoking will should be an *operative will*, for it may fail through the incapacity of the object of the devise, and yet, if it is properly executed according to the 5th section, it will revoke a former will, as is abundantly proved by the case of *Roper v. Radcliffe*, in the House of Lords.^(u)

* [466] The subject of the execution and proof of wills both of disposition and revocation, seems properly terminated here: and thus this first treatise upon the statute of frauds is brought to a conclusion. In a subsequent treatise, as the reader has been advertised,⁽¹⁶⁷⁾ it is my intention, if I am permitted, to examine and systematize the remaining portions of this great reforming statute; which work will be introduced with an elaborate scheme of the doctrine of implied revocations, already digested for the press. For the present, I take leave of the professional student, with the hope of having rendered somewhat less difficult and distressing, his application to this necessary branch of legal inquiry.

(t) Com. 454. (u) Bro. P. C. 450. Vin. Abr. tit. Dev. (R. 3.) pl. 2, in notis.

(166) *Tunc prius testamentum rumpitur cum posterius perfectum est.* D. 28. 3. 2. Domat. 2 part. lib. 3, tit. 1, s. 5, art. 2. Sed. vid. Vinn. Com. 436.

(167) See the Advertisement prefixed to this Volume.

APPENDIX.

29 Car. 2. c. 3.

An Act for Prevention of Frauds and Perjuries.

FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury, and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

Parol leases and interest of freehold shall have the force of estates at will only.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the full improved value of the thing demised.

Except leases not exceeding three years, &c.

III. And moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not

No leases or estates of freehold or

copyhold shall be granted or surrendered by word.

* [468]

Promises and agreements by parol.

being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, *shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law.

IV. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate ; 2. Or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person ; 3. Or to charge any person upon any agreement made upon consideration of marriage ; 4. Or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them ; 5. Or upon any agreement that is not to be performed within the space of one year from the making thereof ; 6. Unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Devises of lands shall be in writing, and attested by three or four witnesses.

V. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June, all devises and bequests of any lands, or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect.

How the same shall be revocable.

VI. And moreover, no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall at any time after the said four and twentieth day of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent ; 2. But all devises and bequests of lands and tenements shall remain and continue in force until the same

be burnt, *cancelled, torn, or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same ; any former law or usage to the contrary notwithstanding.

VII. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

All declarations or creations of trusts shall be in writing.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made ; any thing herein-before contained to the contrary notwithstanding.

Trusts arising, transferred or extinguished by implication of law, are excepted.

IX. And be it further enacted, That all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void and of none effect.

Assignments of trusts shall be in writing.

X. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, it shall and may be lawful for every sheriff, or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognisance, hereafter to be made, or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments, of

Lands, &c. shall be liable to the judgments, &c. of *cestuy que trust*.

And held free from the incumbrances of the persons seised in trust.

Trust shall be assets in the hands of heirs.

No heir shall by reason thereof become chargeable of his own estate.

Estates *pur auter vie* shall be devisable.

And shall be assets in the heir's hand. And where there is no special occupant, shall go to the executors.

*such estate as they be seised of in trust for him at the time of the said execution sued ; 2. Which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued ; 3. And if any *cestuy que* trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, there, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended ; any law, custom, or usage, to the contrary in any wise notwithstanding.

XI. Provided always, that no heir that shall become chargeable by reason of any estate or trust made assets in his hands by this law, shall by reason of any kind of plea, or confession of the action, or suffering judgment by *nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own estate ; 2. But execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come, after the writ purchased, in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon ; any thing in this present act contained to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following ; 2. Be it further enacted by the authority aforesaid, That, from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses ; 3. And if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple ; 4. And in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

*XIII. And whereas it hath been found mischievous, that judgments in the King's courts at Westminster, do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendants' lands from that time, although in truth they were acknowledged, or suffered and signed in the vacation-time after the said term, whereby many times purchasers find themselves aggrieved.

XIV. Be it enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, any judge or officer of any of his Majesty's courts of Westminster, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper, book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered.

The day of signing any judgment shall be entered on the margin of the roll. This clause extends to counties palatine, by 8 Geo. 1, c. 25, s. 6.

XV. And be it enacted, That such judgments as against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail, any law, usage, or course of any court to the contrary notwithstanding.

And such judgments as against purchasers shall relate to such time only.

XVI. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no writ of *fiat facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof, the day of the month or year whereon he or they received the same.

Writs of execution shall bind the property of goods but from the time of their delivery to the officer.

XVII. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandises, for

Contracts for sales of goods for ten pounds or more.

the price of ten pounds sterling, or upwards, *shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agents thereunto lawfully authorised.

The day of the enrolment of recognisances shall be set down; and lands in the hands of purchasers bound from that time only.

XVIII. And be it further enacted by the authority aforesaid, That the day of the month and year of the enrolment of the recognisances, shall be set down in the margent of the roll where the said recognisances are enrolled; 2. And that from and after the said four and twentieth day of June, no recognisance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bona fide*, and for valuable consideration, but from the time of such enrolment; any law, usage, or course of any court to the contrary in any wise notwithstanding.

Nuncupative wills.

XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury; 2. Be it enacted by the authority aforesaid, That from and after the aforesaid four and twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; 3. Nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; 4. Nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Explained by
4 Ann. c. 16,
s. 14.

XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

* [473]

*XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any

court, till fourteen days at least after the decease of the testator be fully expired ; 2. Nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

Probates of nuncupative wills.

XXII. And be it further enacted, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act.

Soldiers' and mariners' wills excepted.

XXIV. And it is hereby declared, That nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect ; subject, nevertheless, to the rules and directions of this act.

The jurisdiction of courts saved.

XXV. And for the explaining one act of this present Parliament, intituled, " An act for the better settling of intestates' estates ;" 2. Be it declared by the authority aforesaid, That neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act. Made perpetual by 1 Ja. 2, c. 17, s. 5.

22 and 23 C. 2, c. 10, husbands not compellable to make distribution of the personal estates of their wives.

*25 Geo. 2, c. 6.

An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in his Majesty's Colonies and Plantations in America.

WHEREAS by an act made in the twenty-ninth year of the reign of his late Majesty, King Charles the Second, intituled, "An act for prevention of frauds and perjuries," it is amongst other things enacted, that from and after the twenty-fourth day of June, in the year of our lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act; therefore, for avoiding the same, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within

the intent of the said *act; notwithstanding such devise, legacy, estate, interest, gift or appointment, mentioned in such will or codicil.

II. And be it further enacted by the authority aforesaid, That in case, by any will or codicil already made, or hereafter to be made, any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act.

III. And be it further enacted by the authority aforesaid, That if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hundred and fifty-two, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

IV. Provided always, and be it further enacted, That in case of such tender and refusal as aforesaid, such person shall in no wise be entitled to such legacy or bequest, but shall be for ever afterwards barred therefrom; and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest which shall have been so paid, satisfied or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever.

V. And be it further enacted, That in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the said twenty-fourth day of June, in the year of our Lord one thousand seven hun-

dred and fifty-two, shall have died in the *life-time of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest, on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest.

VI. Provided always, That the credit of every such witness so attesting the execution of any will or codicil, in any of the cases in this act before-mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court, and the jury, before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

VII. And be it further enacted by the authority aforesaid, That no person to whom any beneficial estate, interest, gift, or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil; or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever.

VIII. Provided always, and be it enacted by the authority aforesaid, That this act, or any thing herein contained, shall not extend, or be construed to extend, to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively, who has been in quiet possession for the space of two years next preceding the sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, as to such lands, tenements, and hereditaments,

whereof he has been in quiet *possession as aforesaid; and also that this act, or any thing herein contained, shall not extend, or be construed to extend, to any will or codicil, the validity or due execution whereof hath been contested in any suit in law or equity, commenced by the heir of such deviser, or the devisee in any such prior will or codicil, for recovering the lands, tenements or hereditaments, mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the said sixth day of May, in the year of our Lord one thousand seven hundred and fifty-one, and which has been already determined in favour of such heir at law, or devisee, in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made; any thing herein-before contained to the contrary thereof in any wise notwithstanding.

IX. Provided always nevertheless, and it is hereby declared, That no possession of any heir at law, or devisee, in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by or under any will or codicil, attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained.

X. And whereas in some of the British colonies or plantations in America, the said act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments, have been required: therefore, to prevent and avoid doubts which may arise in the said colonies, or plantations, in relation to the attestation of such devises of lands, tenements, and hereditaments, be it enacted by the authority aforesaid, That this act, and every clause, matter, and thing therein contained,

shall extend to such of *the said colonies and plantations, where the said act of the twenty-ninth year of the reign of King Charles the Second, is by act of assembly made, or by usage received as law, or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements, or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said act of the twenty-ninth year of the reign of King Charles the Second in England.

XI. Provided always, That as to cases arising in any of the said colonies or plantations in America, no such devise, legacy, or bequest as aforesaid, shall be made null and void by virtue of this act, unless the will or codicil whereby such devise, legacy, or bequest shall be given, shall be made after the first day of March which shall be in the year of our Lord one thousand seven hundred and fifty-three.

Abstract of 26 Geo. 3, c. 63, respecting Wills of Seamen and Marines.

By the statute of 26 Geo. 3, c. 63, s. 1, it is enacted, That no will, made by any petty officer or seaman in the service of his Majesty, his heirs or successors, whereby any wages, pay, prize-money, or allowance of money of any kind, due, or to grow due for such service, is bequeathed, shall be good and valid, and sufficient for the purpose, unless such will, if made by any such officer or seaman then in the service of his Majesty, his heirs and successors, shall be signed before, and attested by the captain, or by the officer then commanding, and one or other of the signing officers of the ship to which such petty officer or seaman shall belong, and shall specify in the body thereof the name of the ship, and also the number at which the maker of such will, or letter of attorney, stands upon the ship's book; or by the agent of any of his Majesty's hospitals or quarters appointed to receive sick and wounded seamen, commonly called *sick-quarters*, in which such petty officer or seaman may be for

the time ; and *unless such letter of attorney, or will, if made by any such officer or seaman who shall have been discharged from the service of his Majesty, his heirs or successors, or if such letter of attorney is made by the executors or administrators of any such officer or seaman, and made within the bills of mortality of the cities of London and Westminster, is attested by an officer to be appointed by the treasurer of his Majesty's navy, for the purpose of inspecting the wills, and letters of attorney, of such officers and seamen, or if made at any of the ports where seamen's wages are paid, is attested by the treasurer of the navy's chief or second clerk, there, or if made at any other place, is attested by the minister and churchwardens of any parish in England or Ireland, or in that part of Great Britain called Scotland, by the minister and two elders of the parish where such petty officer or seaman, executors or administrators, shall respectively reside.

II. That every such will shall contain the name of the ship to which the person granting the same last belonged, and also the full description of the residence, profession, or business of the person to whom, or in whose favour the said will is made, and also the day of the month, and place where the said will was executed.

III. That after such will shall be executed under the hand and seal of the party, and attested in manner above-mentioned, they same shall not be delivered to such party himself, or to any person or persons for his behalf, but the same, if executed abroad, shall be, with all convenient speed, sent by the commander of any of his Majesty's ships, or agent of his Majesty's hospitals or sick-quarters, at the times when they transmit their respective returns to the navy and sick and hurt boards ; or, if executed in Great Britain or Ireland, shall be sent by the commander of any of his Majesty's ships, agents of his Majesty's hospitals or sick-quarters, treasurer of the navy's clerks, minister of the parish, or whoever of them shall attest such will, by the General Post, addressed to the treasurer or paymaster of the navy, at the Navy Pay-Office, London.

IV. That the said treasurer or paymaster of the navy shall immediately deliver over the same to the officer before-mentioned, *appointed for inspecting the wills and letters of attorney of seamen ; which inspector shall immediately on receipt of such letter of attorney, or will, duly register the same. * [480]

And by the 32 Geo. 3, cap. 34, sect. 1, the benefit of the last act was extended to non-commissioned officers of marines, and marines, serving, or who may have served on board any of his Majesty's ships.

By the 8th sect. of the last act it is enacted, That all and every part of the said complement of such ship and ships shall be, and are hereby declared to be, petty or inferior officers, seamen, non-commissioned officers of marines, or marines, excepting such as are rated upon the books of such ships, admirals or flag officers, or their secretaries, captains, and lieutenants, masters, second masters, and pilots, physicians, surgeons, chaplains, boatswains, gunners, carpenters, and pursers, captains of marines, captain-lieutenants of marines, lieutenants, and quarter-masters of marines.

XVI. That where any petty officer or seaman, non-commissioned officer of marines, or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died, or hereafter shall die intestate, leaving any wages, pay, prize-money, or allowances of money of any kind due to him, in respect of services in his Majesty's navy, the same shall not be paid, from and after the said first day of August one thousand seven hundred and ninety-two, unto any representative of such intestate, but upon letters of administration, to be obtained in the following manner *videlicet*, the person claiming such administration, shall send or give in a note or letter to the inspectors of seamen's wills, stating the name of the deceased, the name of the ship or ships to which he belonged, and that he has heard or been informed of his death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased, or to the like effect, upon receipt whereof the inspector of seamen's wills shall deliver or send to the person claiming such administration, a paper in the words and form following, or the like effect :

And upon the receipt of the said paper, the person claiming such administration shall fill up, or cause to be filled up, the several blanks in the first part of the said paper, according as the truth may be, and shall duly subscribe the same ; and two inhabitants of the parish within which the person claiming such administration shall reside, shall sign the first certificate on the said paper, having previously filled up the blanks therein agreeable to the truth, after which the minister and two churchwardens, if in England, and two elders, if in Scotland, shall sign the second certificate upon the aforesaid paper, the blanks therein, being first filled up agreeable to the truth, and the said paper being in all things completed according to the directions thereon and hereby given, the same shall be returned, addressed to the treasurer, or to the paymaster of his Majesty's navy, London, who, upon receiving the same, shall direct the inspector of seamen's wages to examine the same, and make such inquiry relative thereto, as may appear to him necessary on that behalf, and being satisfied, he shall forthwith make out a certificate in the following form, or to the like effect :

Act of Parliament, 32 Geo. 3, c. 34.

No.

Certificate to obtain Letters of Administration.

Navy Pay-Office.

HAVING duly examined an application made to this office by C. D. of _____ and county of _____ stating that [*she or he*] is the [*sole, or one of the*] next of kin of A. B. originally of _____ and late a [*Seaman or Marine*] belonging to his Majesty's ship _____ and who died intestate, a [*Batchelor or Widower*] upon the _____ day of _____ and without leaving any one of a superior degree of kindred to him ; and it appearing *that no will of the deceased has been lodged in this office, I therefore grant this abstract of said application, and certify that I believe what is therein stated to be true, and also that the said C. D. may obtain letters of administration to the effects of the said deceased, which appear not to exceed the sum of _____ pounds ; provided always, that [*she or he*] is otherwise entitled thereto by law.

* [483]

I. P. Inspector.

To

Proctor in Doctors Commons.

N. B. The previous commission or requisition is to be addressed agreeably to the superscription of the within cover, in which the same is to be inclosed, and forwarded by the proctor; and when the commission or requisition shall be returned to this office, it will be forwarded to him, and he is then to sue out letters of administration, and send them to the inspector, with his charge noted thereon.

And after filling up the blanks therein as the case may be, shall sign and address the same to a proctor or proctors in Doctors Commons, the said inspector of seamen's wills shall at the same time inclose and send with such certificate a letter addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying for such letters of administration, then resides; and the treasurer or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission or requisition to be inclosed therein, free of the charge for postage, and which letter so to be addressed to the minister, and to the churchwardens or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect:

No.

Navy Pay-Office,

Day of

Rev. Sir,

HAVING received an application attested by you and two [*Churchwardens or Elders*] of your parish, from C. D. also of your parish, stating that [*she or he*] is the and [*sole or one of the*] next of kin of A. B. late a [*Seaman or Marine*] belonging to his Majesty's navy, and requesting leave to administer to his effects;

*I am directed by act of Parliament of the 32 Geo. 3, chap. 34, to forward you the inclosed [*Commission or Requisition*] for the purpose of swearing [*him or her*] accordingly; provided, to the best of your knowledge and belief, [*she or he*] answers the description contained in the same. * [484]

I am, Rev. Sir,

Your most obedient Servant,

I. P. Inspector.

P. S. When the [*Commission or Requisition*] is executed, you will please to return it, addressed

To the Treasurer, or

To the Paymaster of his Majesty's navy,
London.

And specify and describe the receiver-general of the land tax, collector of the customs, collector of the excise, or clerk of the check; whose abode is nearest to the person applying, who will be directed to pay [*her or him*] the wages due to the deceased.

To A. B.

Minister of the Parish of

N. B. If the application above-mentioned was not attested by you, as stated therein, be pleased to return the inclosed [*Commission or Requisition*] immediately, that means may be taken to discover the imposition.

And the inspector, before he sends such certificate as before directed to the proctor in Doctors Commons, shall fill up the blanks therein agreeably to the circumstances of the case; and the proctor or proctors to whom such certificate shall be addressed and sent, and which shall likewise inclose the letter to the minister, churchwardens, or elders, as aforesaid, shall, immediately upon receipt of the same, sue out the previous commission or requisition, or take such other proper and legal steps as may be necessary towards enabling the person so applying for letters of administration to the deceased intestate, to obtain the same, and shall inclose such previous commission or requisition, or other legal and necessary instrument, with instructions for executing the same, in the letter so to be addressed to the minister and churchwardens, or elders, *and which had been transmitted to him by the inspector of seamen's wills, along with the aforesaid certificate, and shall forward such letter and inclosures as aforesaid, by the General Post, agreeably to the address put thereon by the treasurer of the navy, the paymaster of the navy, or the inspector of seamen's wills.

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XVII. That the minister, and the churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter as aforesaid, with the previous commission or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument

transmitted by the proctor, to be executed, and, being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such letters of administration shall be and reside at a distance from the place where the wages, prize-money, or other allowances of money due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient or nearest to such person applying for such administration; and the said treasurer or paymaster of his Majesty's navy shall, immediately upon the receipt thereof, send the said previous commission or requisition, or other legal instrument, executed by the person applying for the administration as aforesaid, to the aforesaid proctor in Doctors Commons, who, in pursuance thereof, shall forthwith sue out and procure letters of administration in favour of the person so applying for the same, in the manner and form above-mentioned, to the estate and effects of the person who has so died intestate as aforesaid.

XVIII. That where any petty officer, seaman, non-commissioned officer of marines, or marine, belonging, or who shall have belonged to any of his Majesty's ships, has died, or hereafter shall die, and shall have left a will or testament, appointing any executor or executors therein, any pay, wages, prize-money, or allowance of money, which may have been due or owing to such testator at the time of his death, shall not be paid over to, or recovered by such executor or executors, but upon probates of such wills, to be obtained in the following manner, *viz.* after such wills shall have been transmitted, inspected, and lodged in the office of the treasurer *of the navy, as directed by the afore-mentioned act of the twenty-sixth year of the reign of his present Majesty, the inspector of seamen's wills and powers of attorney shall issue, or cause to be issued, a check in lieu thereof, with directions to return the same upon the testator's death, and to which check there shall be subjoined a blank certificate, to be signed by two reputable housekeepers of the parish where such executor is resident at the time such certificate shall be so returned to the pay-office of the treasurer of the navy, certifying that they personally know and believe that he is the person described as executor in the said check; and also another blank

* [486]

certificate, to be signed by the minister of the said parish, and two of the churchwardens, or two elders of the same, as the case may be, certifying that such two persons who certified as above-mentioned, are resident within the parish, and of good repute; and such check and certificates shall be in the form and words following, or to the like effect:

No.

CHECK.

Navy Pay-Office.

IT being directed by acts of parliament, 26 Geo. 3, chap. 63, and 32 Geo. 3, chap. 34, That wills granted by petty officers and seamen, non-commissioned officers of marines, and marines belonging to his Majesty's navy, shall be lodged in this office, for purposes therein specified; and that a check shall be issued for every such will, mentioning the particular heads thereof, which by virtue of the said act, shall stand in place of the same;

This is, therefore, issued to show the receipt at this office of a will, dated at upon the day of granted by A. B. now of formerly of his Majesty's ship in favour of C. D. and appointing E. F. execut [*or rix*] and which is attested by G. H. and I. K. The above E. F. upon the testator's death is entitled, upon production of this check, to demand of this office, the wages, pay, or any other allowances due to the deceased; and that the above-mentioned will be directed and sent to a proctor in Doctors Commons, to obtain a probate thereof, which is also to be lodged in this office.

*[487]

*WE hereby certify, that we personally know the above described E. F. the present holder of this check; and that he is an inhabitant of this parish.

L. M.

N. O.

Both inhabitants of the parish of in
the county of

WE hereby certify, That the above L. M. and N. O. are known to us, are house-keepers, and persons of good repute.

Witness our hands,

At
this day }
of

P. Q. Minister.
R. S. { Churchwardens }
T. U. { or Elders. }

If the testator dies after he leaves the naval service, a certificate of his burial, or some other authentic proof of his death, must likewise be sent to this office.

If the execut[or rix] knows any proctor in Doctors Commons, [she or he] is desired to mention his name, that he may be employed in obtaining the probate.

The above certificates are to be filled up upon the testator's death, and the check to be sent by the General Post, under cover, directed to the treasurer, or to the paymaster of his Majesty's navy, London.

And the said check having been with the certificates duly filled up, returned to the treasurer of the navy, or to the paymaster of the navy, in the event of the testator's death, and the said original will having been passed and stamped in the manner specified and directed by the aforesaid act, passed in the 26th year of the reign of his present Majesty, the inspector of seamen's wills, or the persons authorised to act for him, shall note thereon the amount of the wages due to the said deceased, and shall forward the said will to such proctor or proctors in Doctors Commons as aforesaid, together with a letter addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the said executor or executors, applying for such probate of will, shall then reside; and the treasurer or the paymaster of his Majesty's navy, or the said inspector, or either of them, shall frank the said letter, so as to carry the same, and the previous commission or requisition to be inclosed therein, free of charge for postage; and which letter, so to be addressed to the minister and churchwardens, or elders, as the case may be, shall be in the words, figures, and form following, or to the like effect:

* [488]

No. Navy Pay-Office, 180

REV. SIR,

HAVING received a check, formerly issued by this office, to which there are certificates annexed, attested by you and two [Churchwardens or Elders] of your parish, certifying that C. D. also of your parish, is the person described in the said check to be the execut[or rix] to A. B. late a [Seaman or Marine] belonging to his Majesty's navy, and requesting that a probate of the will of the said A. B. may be granted;

I am directed by act of parliament of the 32 Geo. 3, c. 34, to forward you the inclosed [Commission or Requisition] and copy of

the will, for the purpose of swearing the person so named execut [or rix] accordingly.

I am,

Rev. Sir,

Your most obedient servant,

I. P. Inspector.

P. S. When the [*Commission or Requisition*] is executed, you will please to return it, together with the copy of the will, addressed

To the Treasurer, or

To the Paymaster of his Majesty's navy, London,
And specify and describe the Receiver-General of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the execut [or rix] who will be directed to pay [*him or her*] the wages due to the deceased.

To A. B.

Minister of the Parish of

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* And the said proctor having received the said will, and the said letter so written by the inspector, shall immediately sue out the previous commission or requisition, or take such other proper and legal steps as may be necessary towards enabling the said executor or executors, so applying for probate of the said will, to obtain the same, and shall inclose such previous commission or requisition, or other legal and necessary instrument, with instructions for executing the same, as also a copy of the said will, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and inclosures as aforesaid, by the General Post, agreeable to the address put thereon by the treasurer of the navy, by the paymaster of the navy, or by the inspector of seamen's wills.

XIX. That the minister and the churchwardens, or elders, as the case may be, shall, immediately upon receipt of such letter as aforesaid, with the previous commission or requisition, or other instruments inclosed therein, take such steps as to them may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instruments directed by the proctor to be executed, and the same being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such probate of will shall be and reside at a distance from

the place where the wages, prize-money, or other allowances of money due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient or nearest to the person applying for such probate; and the said treasurer or paymaster of his Majesty's navy shall, immediately upon receipt thereof, send the said previous commission or requisition, or other legal instruments, executed by the person applying for the probate as aforesaid, to the aforesaid proctor in Doctors Commons, who, in pursuance thereof, shall forthwith sue out and procure such probate.

XX. That when any person or persons alleging him, her, or themselves to be creditor or creditors of any petty-officer, seaman, non-commissioned officer of marines, or marine, dying intestate, or leaving a will, of which the executor or executors shall renounce the execution, or shall refuse to act thereupon, shall in that character be desirous of procuring letters of administration, or letters of administration with will annexed, in order to receive any wages, pay, prize-money, or other allowances of money of any kind, due to such petty-officers or seamen, non-commissioned officers of marines, or marines, in respect of services in his Majesty's navy, the same shall not be paid unto any such creditor or creditors as aforesaid, but upon letters of administration, or letters of administration with will annexed, to be obtained in the following manner, viz. such creditor or creditors shall apply by letter or note to the inspector of seamen's wills, stating the nature and amount of his demand, and if the person upon whose account the wages, pay, prize-money, or other allowances are due, shall have died after he left the naval service, such creditor shall also exhibit a satisfactory proof of such death, and if he knows any proctor in Doctors Commons, whom he may wish to employ, he shall mention his name to the said inspector, who shall further require a certificate, signed by two reputable house-keepers of the parish where such creditor is resident, certifying that they personally know him, and believe that he is the person whom he describes himself to be, and also another certificate from the minister of the said parish, and two of the churchwardens, or two of the elders of the same, as the case may be, certifying that such two persons who signed and certified as above-mentioned, are resident within the parish, and of

*[490]

good repute ; and upon receiving such certificates, together with a stated account in writing to such creditor's demand, he shall sign his name to such account exhibited by such creditor, and shall also put a stamp thereon, in token of his approbation thereof ; and every such account, and the vouchers exhibited by such creditor, shall be kept by the said inspector as vouchers of the accounts of the treasurer of the navy, and such inspector shall immediately make, or cause to be made out a certificate, stating the nature and amount of such creditor's demand upon the estate of such petty-officer, seaman, non-commissioned officer of marines, or marine, as aforesaid, deceased, and shall sign and stamp, and forward the same to the proctor or proctors in Doctors Commons as shall have been named by such creditor, and he shall also inclose and send therewith a letter addressed to the minister and churchwardens, or elders, as the case may be, of the parish within which the person applying as creditor for such letters of administration then resides, and the treasurer or paymaster of

*[49]

*his Majesty's navy, or the said inspector, or either of them, shall frank the said letter so as to carry the same, and the previous commission or requisition, or other necessary instruments to be inclosed therein, free of the charge for postage, and which letter, so to be addressed to the minister, and to the churchwardens, or elders, as the case may be, shall be in the following words, figures, and form, or to the like effect ;

No.

Navy Pay-Office,

180

Rev. Sir,

HAVING received certificates, attested by you and two [Churchwardens or Elders] of your parish, from C. D. stating that he is resident therein, and desiring to administer to the effects of A. B. late of his Majesty's navy, as his creditor ;

I am directed, by act of parliament of the thirty-second of George the Third, ch. 34, to forward you the inclosed [Commission or Requisition] for the purpose of swearing him accordingly.

I am,

Rev. Sir,

Your most obedient Servant,

I. P. Inspector.

P. S. When the [Commission or Requisition] is executed, you will please to return it, addressed

To the Treasurer, or
To the Paymaster of his Majesty's navy,
London.

And specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, whose abode is nearest to the above creditor, who will be directed to pay that part of the wages due to the deceased which [*she or he*] appears by law entitled to receive.

To A. B.

Minister of the Parish.

*And the proctor or proctors to whom the aforesaid certificate shall be addressed and sent, and which shall likewise inclose the letter to the minister, churchwardens, or elders as aforesaid, shall, immediately upon receipt of the same, sue out the previous commission or requisition, or take such other proper and legal steps as may be necessary towards enabling the person so applying as creditor for letters of administration to such deceased, to obtain the same, and shall inclose such previous commission or requisition, or other legal and necessary instruments, with instructions for executing the same, together with a copy of the will in cases of administration with the will annexed, in the letter so to be addressed to the minister, churchwardens, or elders, and shall forward such letter and inclosures, as aforesaid, by the General Post, agreeable to the address put thereon by the treasurer of the navy, paymaster of the navy, or the inspector of seamen's wills; and if it shall be necessary to cite the next of kin, notice of such citation shall be previously given to the said inspector, who shall point out one or more public papers, in which such citation shall be inserted.

*[492]

XXI. That the minister and churchwardens, or elders, as the case may be, shall, immediately upon the receipt of such letter, as aforesaid, with the previous commission or requisition, or other instruments, inclosed therein, take such steps as to them may seem proper or necessary for procuring the execution of such previous commission or requisition, or other instrument, directed by the proctor to be executed, and, being so executed, he or they shall transmit the same to the treasurer, or to the paymaster of his Majesty's navy, London; and if the person applying for such administration shall be and reside at a distance from the place where the wages, prize-money, or other allow-

*[493]

ance of money due to the deceased, are payable, he or they shall specify and describe the receiver-general of the land-tax, collector of the customs, collector of the excise, or clerk of the check, who may be most convenient or nearest to such person claiming such administration ; and the said treasurer or paymaster of his Majesty's navy shall, immediately upon receipt thereof, send the said previous commission or requisition, or other legal instruments, executed by the person applying for the administration as aforesaid, to the aforesaid proctor or proctors in Doctors Commons, who, in pursuance thereof, shall forthwith sue out and procure letters of administration in favour of the person so applying as creditor for the same, in the form and manner above-mentioned, to the estate and effects of the person who has died as aforesaid, but which letters of administration may and shall only entitle such administrator, as creditor, to receive such part of the estate of such petty-officer, seaman, non-commissioned officer of marines, or marine, as shall satisfy the amount of the claim or demand made by him as aforesaid, together with expenses incurred in establishing his right as aforesaid, to receive the same, and the balance of such intestate's estate, (if any) after satisfying the demand of such creditor, and expenses incurred, shall remain in the hands of the treasurer of the navy, subject to the claim and demand of any other creditor, next of kin, or executor, to take and receive the same, when legally authorised so to do.

XXII. That as soon as any letters of administration, or probates of wills, or letters of administration with will annexed, have been obtained, and passed the seal of the proper court, in the manner herein-before directed in the different events herein-before specified, the proctor or proctors who have sued out the same, shall immediately send such letters of administration, or probates of wills, or letters of administration with will annexed, addressed to the treasurer, or to the paymaster of his Majesty's navy, together with an account of his or their charges and expenses in obtaining the same, which said charges and expenses shall not exceed the sum or sums herein-after allowed to be charged in the different events herein-after specified ; and the said treasurer or paymaster of his Majesty's navy, upon receiving such letters of administration, or probates of wills, or letters of administration with will annexed, shall direct the inspector of

seamen's wills, or the person authorised to act for him, to issue, or cause to be issued, a check, containing the heads of such letters of administration, or probate of will, or letters of administration with will annexed, as the case may be ; and the said inspector, or the person authorised to act for him, shall note thereon the amount of the said proctor or proctors' charges and expenses, provided the same shall be at and after the rates herein-after allowed to be charged, and likewise specify and describe upon the said check, the revenue officer or clerk of the check, residing as aforesaid nearest to the administrator or executor so to be named in such check, if such communication shall have been made to him ; and in cases of letters of administration, or letters of administration with will annexed, granted to creditors, he shall also note upon *such check the amount due to such creditors, and which check of letters of administration, or letters of administration with will annexed, so prepared, shall be delivered over by him to the said administrator, and which check of probate of will shall be delivered over by him to the said executor, together with the copy of the will which had been transmitted to him by the proctor or proctors in Doctors Commons, the said copy being first stamped by the inspector, if the said administrator, or the said administrator with will annexed, or the said executor, as the case may be, shall be present or demand the same in person ; but if he shall not be present, but be and reside at a distance, then and in that case the said inspector shall deliver such check, and such copy of will, to the deputy-paymaster, and which shall be in the following form, or to the like effect :

* [494]

No.

CHECK.

Navy Pay-Office,

Day of

IT being directed by acts of parliament, twenty-sixth *George* the Third, chap. 63, and thirty-second *George* the Third, chap. 34, that letters of administration, and probates of wills, granted to the representatives of petty-officers and seamen, non-commissioned officers of marines, and marines, belonging to his Majesty's navy, shall be lodged in this office, as vouchers to the treasurer for payments made thereon, and that a check shall be issued for every such administration and probate of will, and administration with will annexed, specifying the particular heads thereof, which by virtue of the said act shall stand in place of the same :

This is therefore issued to show receipt at this office of
 [*Letters of Administration, Probate of Will, Letters of Administration with Will annexed*]
 granted to C. D. of _____ in the county of _____
 as [*Administrat* , *Execut* , *Administrat with Will annexed*] of A. B. late of his Majesty's ship _____ dated _____
 Day of _____

No.

Remittance bill to be addressed to
 at _____

* [495] *The aforesaid *Letters of Administration, Probate of Will, Letters of Administration with Will annexed* were sued out by _____ proctor in Doctors Commons, whose charges amount to _____

I. P. Inspector.

To the Deputy Paymaster of the Navy.

XXIII. Provided that where any sum not exceeding the sum of ten pounds shall be due for the services as aforesaid of any petty officer or seaman, non-commissioned officer of marines, or marine, deceased, in order that the widow, next of kin, creditor, or person named as executor in any will or testament of such petty officer or seaman, non-commissioned officer of marines, or marine, may not be put to great expense, it shall and may be lawful for the inspector of seamen's wills, after having taken the previous steps to ascertain the justness of their respective claims to probate or administration, or administration with will annexed, (in like manner as he has herein-before directed to take in cases of granting certificates to Doctors Commons for letters of administration, or letters of administration with will annexed, or for probates of wills) to issue or cause to be issued a certificate in the following form, or to the like effect :

Act of Parliament, thirty-second Geo. 3, c. 34.

No.

CERTIFICATE.

Navy Pay-Office, _____ day of _____

HAVING duly examined a claim presented to me as inspector of seamen's wills, &c. by A. B. of _____ in the county of _____ stating that [*he or she*] is the _____ of C. D. originally of _____ and _____

lately a [*Seaman or Marine*] belonging to his Majesty's ship
and who died at on the

I therefore hereby certify, that I believe the contents as
therein stated to be true, and also that the said A. B. is entitled
to receive whatever wages, prize-money, and other allowances
of money may be due to the said deceased, provided the amount * [496]
thereof does not exceed the sum of ten pounds.

Remittance bill to be addressed to

at

I. P: Inspector.

To the deputy paymaster of the navy, who shall take care to
note hereon all sums which he shall pay, or cause to be paid, up-
on the authority of the same.

And which certificate, so prepared, shall be delivered over
by him to the said widow, next of kin, creditor, or person
named as executor, if he or they shall be present, but if he
or they shall not be present, but be and reside at a distance,
then and in that case the said inspector shall specify and de-
scribe upon the said certificate the revenue officer residing as
aforesaid nearest to such widow, next of kin, creditor, or person
named as executor, and shall deliver such certificate to the de-
puty-paymaster.

XXXI. That, from and after the said first day of August,
one thousand seven hundred and ninety-two, no Ecclesiastical
Court, proctor or proctors in such courts, nor any person or
persons, whatsoever, under any pretence, shall take and re-
ceive any more than the sum of fifteen shillings and two-pence,
for the seal, parchment, writing, and suing forth the probate of
any will, granted to the executors of any warrant or any petty
officer, seaman, non-commissioned officer of marines, or marine,
for the purpose of receiving wages or pay, or allowances of mo-
ney of any kind, which shall remain due to such warrant or pet-
ty officer or seaman, non-commissioned officer of marines, or
marine, at the time of his or their death, for his or their ser-
vices in his Majesty's navy, and for the pains, trouble, and ex-
pense, attending the suing forth such probate, nor more than
the sum of one pound four shillings and two-pence for letters of
administration, granted to the next of kin of any warrant or
petty officer, seaman, non-commissioned officer of marines, or
marine, unless the goods and chattels of such warrant or petty

*[497]

officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of twenty pounds, nor more than the sum of one pound eight shillings and eight-pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine; nor more than the sum of one pound seventeen shillings and eight-pence for any such letters of administration, granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of forty pounds; nor more than the sum of one pound eleven shillings and two-pence, for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine; nor more than the sum of two pounds eight shillings and six-pence, for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of sixty pounds; nor more than the sum of one pound thirteen shillings and eight-pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine; nor more than the sum of two pounds eleven shillings for any such letters of administration granted to the next of kin of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the sum of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the executors or administrators of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, no Ecclesiastical Court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take or receive more than the sum of fifteen shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble, and expense attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines,

or marine, do amount to the value of twenty pounds: nor more than the sum of one pound three shillings, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds.

*XXXII. Provided always, That no Ecclesiastical Court, proctor or proctors in such court, nor any person or persons whatsoever, under any pretence, shall take and receive any more than the sum of six shillings for the seal, parchment, writing, and suing forth the probate of any will granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister, of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, for the purpose of receiving wages or pay, or allowances of money of any kind, which shall remain due to such warrant or petty officer or seaman, non-commissioned officer of marines, or marine, at the time of his or their death, for his or their services in his Majesty's navy, and for the pains, trouble, and expense attending the suing forth such probate; nor more than the sum of fourteen shillings for the letters of administration granted to the widow, children, father, mother, brother, or sister, of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer of marines, or marine, do amount to the value of twenty pounds; nor more than the sum of nineteen shillings and six-pence for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executor being the widow, children, father, mother, brother, or sister as aforesaid; nor more than the sum of one pound seven shillings and six-pence for any such letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of forty pounds; nor more than the sum of one pound three shillings for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, bro-

ther, or sister as aforesaid ; nor more than the sum of one pound eleven shillings for any such letters of administration granted to the widow, children, father, mother, brother, or sister, of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels *of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of sixty pounds ; nor more than the sum of one pound seven shillings and six-pence, for any such probate granted to the executors of any warrant or petty officer, seaman, non-commissioned officer of marines, or marine, such executors being the widow, children, father, mother, brother, or sister as aforesaid ; nor more than the sum of one pound fifteen shillings and six-pence for any such letters of administration granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds ; and in all cases where it shall be necessary to issue commissions or requisitions to swear executors or administrators, being the widow, children, father, mother, brother, or sister of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, no Ecclesiastical Court, proctor or proctors in such court, or any person or persons whatsoever, under any pretence, shall take or receive more than the sum of twelve shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble, and expense attending the same, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of twenty pounds ; nor more than the sum of fifteen shillings and six-pence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of forty pounds ; nor more than the sum of sixteen shillings and six-pence, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of sixty pounds ; nor more than the sum of eighteen shillings and six-pence, unless the goods and chattels of such warrant or petty officer, seaman, non-commis-

sioned officer of marines, or marine, do amount to the value of one hundred pounds.

XXXIII. And be it hereby further enacted, That, from and after the said first day of August, one thousand seven hundred and ninety-two, no Ecclesiastical Court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take and receive more than the sum of five *shillings for the seal, parchment, writing, and suing forth of the probate of any will, or any letters of administration, granted to the widow, children, father, mother, brother, or sister of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, and for the pains, trouble, and expense attending the suing forth such probate or letters of administration, unless the goods and chattels of such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds; and in all cases where it shall be necessary to issue commissions or requisitions to swear the widow, children, father, mother, brother, or sister, being executors or administrators of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, no Ecclesiastical Court, nor any person or persons whatsoever, save as herein-before mentioned, under any pretence, shall take or receive more than the sum of five shillings for the seal, parchment, writing, and suing forth of any such commission or requisition, and for the pains, trouble, and expense attending the same, unless the goods and chattels of any such warrant or petty officer, seaman, non-commissioned officer of marines, or marine, do amount to the value of one hundred pounds.

* [500]

XXXIV. That, in all cases where it shall be necessary to grant letters of administration, or letters of administration with will annexed, to any creditor or creditors of such petty officer, seaman, non-commissioned officer of marines, or marine, the proctor or proctors suing forth, or causing the same to be sued forth, shall make out a bill of costs, which he or they may have actually paid for stamps, or fees in the Ecclesiastical Court, or otherwise or elsewhere, and which bill of expenses shall also contain an account of charges for his or their pains and trouble in every thing attending or relating to the suing out, or causing to be sued out, such letters of administration, or letters of ad-

* [501]

ministration with will annexed; which bill of expenses and charges the said proctor or proctors shall lay before the registers of the prerogative court of Canterbury, or certain deputies authorised to act for them, to be examined and taxed, and the said registers and deputy-registers are hereby authorised to examine and tax the same; and which bill of costs and charges, after having been so examined and taxed by the said registers of the prerogative court of Canterbury, or by their deputies, or by any one of the said registers, or by any one of the said *deputies, they shall certify the same, or that part of the same which remains after being so taxed, to be fair and equitable charges, according to the usual fees allowed, and customary charges made by proctors in Doctors Commons, and then shall return the said letters of administration, or letters of administration with will annexed, and the said bill of expenses and charges, to the proctor or proctors who shall have so laid the same before them, and which bill of costs and charges shall be allowed to contain a fee of three shillings and four-pence, to be paid to the said registers, or to the said deputy registers, who shall have so taxed and examined the same; and when the said proctor or proctors have finally obtained such letters of administration, or letters of administration with will annexed, granted to the creditors of such petty officer or seaman, non-commissioned officer of marines, or marine, and such bill of expenses and charges, certified as herein-directed, he or they shall forward such letters of administration, and letters of administration with will annexed, and certificates of expenses and charges, to the treasurer, or to the paymaster of his Majesty's navy; and if any officer or officers, proctor or proctors, or any other person or persons, shall presume to take any more than the several sums herein-before allowed and directed to be taken, in the different events specified, for the charges of probates, letters of administration, commissions and requisitions, in the manner herein particularly mentioned and expressed, the person or persons so offending shall forfeit to the party aggrieved the sum of fifty pounds, to be recovered with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, or elsewhere; or if any register or other officer of any Ecclesiastical Court shall knowingly and wilfully be aiding or assisting in procuring probate of the will or letters of ad-

ministration, for the purpose of enabling any person or persons to receive the wages, pay, prize-money, allowance of money of any kind due, or becoming due for the services of any petty officer, seaman, non-commissioned officer of marines, or marine on board any ship or ships, then or formerly belonging to his Majesty or his predecessors, or heirs and successors, otherwise than in the manner prescribed by this act, and the other act herein-before mentioned, passed in the twenty-sixth year of the reign of his present Majesty, every such proctor, register, or other officer, shall for ever after be incapable of acting as proctor, register, or in any other capacity, in any Ecclesiastical Court in Great Britain, and shall for every such offence *forfeit and pay the sum of five hundred pounds, to be sued for, recovered, and levied by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, and one half of every such penalty or forfeiture shall be and belong to his Majesty, his heirs and successors, and one half to him or them who shall discover, inform, or sue for the same. • [502]

XXXV. Provided always, and be it further enacted by the authority aforesaid, That whenever any extraordinary pains, trouble, or expense has attended the suing out letters of administration, or letters of administration with will annexed, to the widows or next of kin, or probates of wills to the executors of any such petty officers or seamen, non-commissioned officers of marines, or marine, the proctor or proctors who have sued out the same, may, in consideration thereof, make an addition in proportion to the said extraordinary pains, trouble, and expense, to his or their bill of charges and expenses, and which appearing reasonable, the inspector shall allow and pass the same; but if the same shall appear unreasonable or exorbitant to the treasurer or paymaster of the navy, in that case the said bill of charges and expenses shall be returned to Doctors Commons, to be checked and taxed as aforesaid by the registers, or any one of them, or by the deputy-registers, or any one of them, who are hereby directed so to do without fee or reward, unless the said charges and expenses shall have arisen in consequence of any litigation or suit respecting the obtaining or suing out such letters of administration, letters of administration with will annexed, or probate of will, in which cases the said regis-

ters, or deputy registers, shall be permitted to charge and take the aforesaid fee of three shillings and four-pence.

By the 32 Geo. 3, c. 67, the provisions of these two acts are extended to petty officers and seamen, non-commissioned officers of marines, and marines, serving or who may have served on board any of his Majesty's ships, and who are resident in Ireland.

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